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The Competing Claims of the Customary Law of State Sovereignty and the Concept of "Global Partnership" in the Evolution of International Environmental Agreements

by

Omolara Oladipo

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements of the degree of Master of Laws.

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ABSTRACT

The main goal of this thesis is to address the lack of effectiveness in international environmental agreements, based on perceived conflicting concepts of the customary law of sovereignty and a newer "global partnership"concept.

To achieve this goal, the thesis will proceed on the premise that the effectiveness of existing international environmental treaties is what we have to address rather than a paucity of environmental treaties. This thesis examines the evolution of the two concepts and the practical application of the seeming conflicts in two international regimes, *viz.*, the international trade in endangered species of wildlife and the climate change regime.

The thesis recommends a more active redefinition of the roles and responsibilities of non-governmental organisations (NGOs) in a bid to utilize the positive attributes ascribed to them in addressing the seeming conflict identified.

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Omolara Oladipo

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LIST OF ABBREVIATIONS

AOSIS	–	The Alliance of Small Island States.
AIJ	–	Activities Implemented Jointly.
CBD	–	The Convention on Biological Diversity.
CBDR	–	The Common but Differentiated Responsibilities Principle.
CDM	–	The Clean Development Mechanism of the Kyoto Protocol.
CEITs	–	Countries with Economies in Transition.
CERs	–	Certified Emission Reductions.
CITES	–	The Convention on International Trade in Endangered Species of Wild Fauna and Flora.
COP	–	The Conference of the Parties, the supreme body of the Kyoto Protocol.
COP/MOP	–	The Conference of the Parties serving as the Meeting of the Parties.
DSB	–	Dispute Settlement Body of the WTO.
DSU	–	Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO.
ECs	–	Epistemic Communities.
ENGOs	–	Environmental Non-Governmental Organizations.
ERUs	–	Emission Reduction Units.
ETMs	–	Environmental trade measures.
E.U.	–	European Union.
GEF	–	Global Environment Facility.
GHG	–	Greenhouse Gas.

HFCs	–	Hydrofluorocarbons.
INC	–	Intergovernmental Negotiating Committee (of the United Nations).
IUCN	–	International Union for the Conservation of Nature (formerly known as World Conservation Union or WCU).
IPCC	–	Intergovernmental Panel on Climate Change.
JUSSCANZZ	–	An acronym for the bloc comprising Japan, the United States, Switzerland, Canada, Australia, Norway and New Zealand, and sometimes Iceland and South Korea.
Mt	–	Mt is a simplification of the unit million tonnes of carbon dioxide equivalent.
NGOs	–	NonGovernmental Organisations.
NSGs	–	National State Governments.
OECD	–	Organisation for Economic Co-operation and Development.
OPEC	–	Organization of Petroleum Exporting Countries.
PFCs	–	Perfluorocarbons.
PSNR	–	The Principle of Permanent Sovereignty over Natural Resources.
SBSTA	–	The Subsidiary Body for Scientific and Technological Advice.
SF6	–	Sulfur hexafluoride.
TANs	–	Transnational Advocacy Networks.
TECs	–	Transnational Epistemic Communities.
TRAFFIC	–	Trade Records Analysis of Fauna and Flora in Commerce.
U.S.	–	The United States of America.
UN	–	The United Nations .

UNCED	–	United Nations Conference on Environment and Development.
UNDP	–	United Nations Develpment Programme.
UNEP	–	United Nations Environment Programme.
UNFCCC	–	United Nations Framework Convention on Climate Change.
WMO	–	World Meteorological Organization.
WTO	–	World Trade Organisation.

CHAPTER 1

INTRODUCTION

1.1 An Overview

Environmental problems have gradually become less localized and, as a result, solutions are being sought on a global scale. As simplistic as this may at first appear to be, attempts by nations to forge solutions to environmental problems have come up against obstacles, some of which this thesis will address. Over time, there have been numerous legal scholarly writings on the issue of "globalism" or "globalization." The major concerns of this thesis are the seemingly conflicting concepts of sovereignty and global partnership. Although these two concepts will be discussed in depth in the coming chapters, I will briefly expatiate on the relevance of the concepts to my thesis.

The term "environment" is not defined in any of the major international agreements.[1] It appears though that there is an unspoken acceptance of the general understanding of the term. Previously, discoveries, disasters and decisions relating to environmental issues were localised. States dealt with natural disasters and other environmental issues peculiar to their geographical domain. However, environmental issues have gradually ceased to be restricted to geographical entities. There is an increasing acceptance by the international community of these discoveries, disasters and decisions, as concerning not just the geographical entities where they occur, but also the international community because of their global effect.

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[1] P. Birnie & A. Boyle, *International Law & the Environment*, 2d ed. (Oxford: Oxford University Press, 2002) at 3.

Of itself, the acceptance of the global effect of environmental disasters and decisions has altruistic overtones. However, the age-old common law concept of nations as entities answerable only to themselves in matters concerning them and occurring within their recognized boundaries has become an obstacle to the reality of the global nature of environmental issues. The term "global partnership" has been used to describe the acceptance of environmental issues as global in nature and effect. As is to be expected, there are various understandings of the concept of global partnership as a result of the concept of inter-generational and intra-generational justice or equity in matters of common concern on the global agenda. Also, not to be overlooked is the issue of the criteria used in the distribution of the fault ascribed to environmental disasters and decisions mentioned above. As will be discussed throughout this thesis, this notion of blame has engendered what will be referred to as the North-South attitudes or reactions to environmental issues.

The 2001 Report of the UN Secretary-General entitled "Implementing Agenda 21" recognized that, despite the number of initiatives undertaken by the United Nations Environment Programme (UNEP) and other partners, there is a lack of significant progress toward both environmental protection and the reduction of poverty.[2] The Report identifies four major gaps in the implementation of sustainable development. First, "a fragmented approach has been adopted toward sustainable development."[3] The integration of environmental, social and economic concerns into decision-making has not been as fully implemented as it should have been. Secondly, the Report

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2 See generally, the 2001 Report of the UN Secretary-General, online: Economic and Social Council: <http://www.johannesburgsummit.org/html/documents/no170793sgreport.pdf> (date accessed: 11 March 2004). See Steve Charnovitz "A World Environment Organization" (2002), 27 Colum. J. Envt'l. L. 323; See also, Jodie Hierlmeier, "UNEP: Retrospect and Prospect – Options for Reforming the Global Environment al Governance Regime"(2002)14 Geo. Int'l Envt'l. L. Rev. 767.

3 The 2001 Report of the UN Secretary-General, *ibid.*

deplores the continued unsustainable patterns of global production and consumption.[4] Third, in the areas of trade, finance, technology and sustainable development, much-needed cohesion is lacking.[5] Finally, developed states have not lived up to their commitments, rendering sustainable development in developing countries unachievable.[6] According to the Report, assistance in the area of development has steadily declined since 1992.[7] Thus, despite the numerous international instruments aimed at protecting the global environment that have been adopted prior to and following the United Nations Conference on Environment and Development (UNCED),[8] the health of the planet is deteriorating and increasing numbers of people are dying of diseases, malnutrition and a lack of clean water. The Malmö Declaration, written by the world's Ministers of Environment, sums up the environmental threats that the international community must address:

> Environmental threats resulting from the accelerating trends of urbanization and the development of megacities, the tremendous risk of climate change, the freshwater crisis and its consequences for food security and the environment, the unsustainable exploitation and depletion of biological resources, drought and desertification, and uncontrolled deforestation, increasing environmental emergencies, the risk to human health and the environment from hazardous chemicals, and land-based sources of pollution, are all issues that need to be addressed.[9]

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4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

7 See United Nations General Assembly, Earth Summit +5: Programme for the Further Implementation of Agenda 21, UN GAOR, Spec. Sess., 23-28 June 1997, online: United Nations <http://www.un.org/documents/ga/res/spec/aress19-2.htm> (date accessed: 11 March 2004) paragraph 4.

8 See Edith Brown-Weiss, "International Environmental Law: Contemporary Issues and the Emergence of a New World Order" (1993) 81 Geo.L.J. 675 at 679.

9 See the Global Ministerial Environment Forum, Malmö Ministerial Declaration, 6th Special Session of the Governing Council, 5th plenary meeting (31 May 2000), online: UNEP <http://www.unep.org/malmo/malmo_ministerial.htm> [hereinafter the Malmö Declaration] (date accessed: 11 March 2004).

For example, despite the adoption of the United Nations Framework Convention on Climate Change (UNFCCC)[10] at UNCED, emissions of carbon from fossil fuel burning, a global total of 6.3 billion tons annually,[11] have brought the atmospheric carbon dioxide concentrations to their highest level in 20 million years. The 1990s were recorded as the warmest decade of the last millennium, and 1998 as the warmest year.[12] By the end of this century, temperatures are projected to be capable of rising as much as 5°C higher than in 1990.[13] Global warming poses significant risks to the natural world and human society, such as the accelerated polar warming and diminishing sea ice and ice sheets, a rise in sea level, flooded coastal cities, diminished food production, loss of biodiversity, an increase in natural disasters and a greater prevalence of infectious diseases.[14]

This thesis will be written within the parameters of the North-South views of the concepts under discussion with particular reference to two international agreements – the climate change regime[15] and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[16] The rationale behind the choice of CITES is that it is a treaty that has been in force for more than three decades and an examination of this agreement will present the opportunity to

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10 See *infra* note 16.

11 World Watch Institute, State of the World 2001 (New York: W.W. Norton & Company, 2001) at 86.

12 *Ibid.*

13 Annie Rochette, "Stop the Rape of the World: An Ecofeminist Critique of Sustainable Development" (2002) 51 U.N.B.L.J. 145 at 147.

14 *Ibid.*

15 The regime consists of the *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849; online: UNFCCC <http://unfccc.int/resource/conv/conv.html>[hereinafter UNFCCC] (date accessed : October 2003); *Kyoto Protocol to The United Nations Framework Convention on Climate Change*, 10 December 1997, 35 I.L.M. 1165; online: UNFCCC <http://unfccc.int/resource/docs/ convkp/ kpeng.html>[hereinafter the Kyoto Protocol or the Protocol] (date accessed: 11 March 2004).

16 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 12 I.L.M. 1085 (1973), online; UNEP<http: //www.cites. org/eng/disc/ text.shtml#texttop>[hereinafter CITES or the Convention] (date accessed: 11 March 2004).

examine the progress (or lack thereof) of the attempt by the drafters to delve into territories that have both figuratively and physically been hitherto within the jurisdiction of individual states. As for the climate change regime, where the Kyoto Protocol which contains stringent state obligations is not yet in force, it is hoped that the examination of the politics surrounding its present status will reveal the inherent flaws in the approach to addressing the climate change issue.

The argument postulated by this thesis is that, although the history of treaty negotiations reveals attitudes of the North and the South to whom is at fault for the existence of environmental problems, there is a need for a change in these attitudes if any realistic progress is to be made in addressing environmental problems, especially in the light of the global reach of such problems. The redefinition of the concept of state sovereignty examined in chapter one of this thesis makes the notion of interdependence between the North and the South, as opposed to the absolute dependence of the South on the North, more realistic for the desired effectiveness of international environmental agreements. There is a constant battle between the accepted principle of state sovereignty and the need for global cooperation on environmental issues. International environmental agreements currently are not as effective as they should be because of the attitudes of countries from the North and the South.

There are some frequently used terms that need to be explained here. The term "North" is used generally to refer to Western developed nations. The term "South" refers to the developing or least developed nations of Asia, Africa, Latin America and the Caribbean.[17]

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[17] These terms are usually understood withing the context of the difference in wealth between the rich countries of the world in the North and the poor countries in the South. See online:Freesearch <http://www.freesearch.co.uk/dictionary/north-south> (date accessed: 11 March 2004). See also, John W. McDonald, *The North-South Dialogue and the United Nations*. (Washington, D.C.: Georgetown University, 1982). Yet a third category is the "Countries in Transition" – a category that this thesis is barely concerned with. However, this will be mentioned a few times to denote countries with economies in

The choice of the North and South perspectives is based on the writer's understanding of the role of these perspectives in the effectiveness of international agreements. As will be discussed later in this thesis, there is a notion that needs to be disabused, and that notion is that the North is alone in its concern for the environment. "The implication is that the poor are not green either because they lack awareness, or because they have not enough money to invest in the environment or both together." [18] The assumption that flows from this is that the South always takes a stand "against" the environment and that any Southern participation has to be garnered by using what in essence is tantamount to the "carrot and the stick" method, offering incentives for participation.[19] Admittedly, Southern perspectives may be inseparable from broader economic, social, cultural and historic factors, but this does not minimize the concerns of the South for the environment. An example is the Basel Convention[20] and the initiative taken by developing countries to create an alternative regional regime[21] in the face of dissatisfaction with the Basel Convention.

1.2 Organisation

The thesis is divided into five chapters: chapter one being the introduction and general overview of the thesis. The second chapter traces the evolution of the customary law of state

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transition in Central and Eastern Europe.

18 Ramachandra Guha & Juan Martinez-Alier, *Varieties of Environmentalism: Essays North and South* (London: Earthscan Publications, Ltd., 1997).

19 Karin Mickelson, "South, North, International Environmental Law, and International Environmental Lawyers"(2000) 11 Yearbook of International Environmental Law 52 at 66.

20 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, (1992) 28 I.L.M. 649; online <http://www.basel.int/text.html> (date accessed: 11 March 2004).

21 *Convention on the Ban of the Import into Africa and the Control Of Transboundary Movement and Management of Hazardous Wastes Within Africa* (Bamako Convention) (1991) 30 I.L.M. 775 ; online: <http://www.basel.int/misclinks/bamako.html> (date accessed: 11 March 2004). See Mickelson, *supra* note 20 at 67.

sovereignty from the traditional concept of absolute independence to the qualified independence that seems to characterise international law currently, especially on environmental issues. Both concepts will then be placed against the backdrop of international environmental problems, agreements and regulatory laws. A cursory survey will be carried out of the history of international environmental agreements viewed in the light of political and economic independence with special highlights on the newer concept of "global partnership." The overall aim of the second chapter is to examine the role of general international law as a whole on the evolution of a legal order of the environment oriented toward the unfettered freedom of states. Toward a background for an understanding of the positions taken by the players in the evolved international environmental regime, brief reference will be made to the reasons behind the positions adopted by them. There will be a more in-depth discussion of the proposal of a "global partnership" and the consequences of such partnership on the formulation and negotiation of treaties. Issues that appear to stand in the way of the feasibility of this concept as proposed will also be highlighted. This chapter will lay the background for the third and fourth chapters where specific treaties will be examined with a notion to bringing out the existence of the need for a reappraisal of the customary law of sovereignty.

Chapter three will examine CITES with a view to drawing out any attempts at cooperation and the effects of these measures on the customary law concept of sovereignty. Chapter four examines the climate change regime with a special focus on the Clean Development Mechanism (CDM) of the Kyoto Protocol as a mechanism for global cooperation and especially for the inclusion of less-developed countries in the process of environmental conservation and protection, and hopefully in the process will address the sovereignty concerns.

The agreements in chapters three and four address several of the major issues that

affect, to a greater degree, developing countries in the South. They will be helpful in arriving at a determination of the issues to be raised in the following chapter. The background to the treaties will be traced, with the goal of showing the sovereignty issues that arose at the negotiation stages and how in resolving some of these issues the conceptions of sovereignty were either redefined or expanded. Although what will be attempted in chapters three and four will not be a comparison of agreements and mechanisms, treaty mechanisms that appear to proffer the most innovative and effective solutions to important compliance issues raised will be recommended with a view to modifying and adapting them to other suitable treaties.

Chapter five will examine the stereotyped views of compliance and implementation. This will be done against the background of the reality of both terms. The biggest problem with international environmental treaties is not scantiness or even paucity in content, it is the implementation of the agreements and compliance with their terms. Therefore, this chapter examines the issues of implementation and compliance, using the treaty mechanisms examined in the third and fourth chapters as case studies. This logically leads to an examination of the effectiveness of the mechanisms of the treaties. The North-South divide as a possible reason for a lack of effectiveness will also be examined.

There are different reasons why countries sign and ratify treaties. There are also differing capacities for compliance in different countries. These facts alone dictate that the approach to implementation of and compliance with treaties that affect the environment differs from state to state. Factors that affect implementation of and compliance with treaties – including the economy, equitable distribution of duties and obligations of nation states, the nature of the problem sought to be addressed by the treaty, political systems, and even national (or traditional) practices and

understanding are relevant to this thesis. As some of these factors are extralegal, this chapter will identify and focus on the factors that can be addressed by international law.

Chapter five will conclude by proffering some recommendations toward a more efficient environmental regime where stakeholders (i.e., states, non-governmental organisations (NGOs), multinational corporations and other companies) will feel a sense of achieving most of their goals. The chapter also examines the costs of giving up the sense of superiority of North states over South states which seems to pervade international relations, with a view to ascertaining the likelihood of its occurrence. The chapter concludes with recommendations on the identified tension between the issues of global partnership and sovereignty.

CHAPTER 2

STATE SOVEREIGNTY AND INTERDEPENDENCE

2.1 The Customary Law of State Sovereignty

In the international arena, amongst scholars, diplomats, politicians, policy makers, international organisations and government officials, the term "sovereignty" is a very popular word. However, as often as it is casually referred to, the term is hardly ever identified. The assumption is that the meaning of the word is universally recognized.[1]

The term "sovereignty" has, over time, been used in different ways to mean different things, based on different assumptions about authority and control. As a result, the term is continually evolving. State authority and/or control has been modified according to these stages of evolution. Therefore, when the term is used, it may mean one of several things as it has to be placed within the context of the periods of the evolution of the term.

In essence, the meaning of the term is at best vague. There is a need, however, to attempt to understand some of the major connotations it has acquired over time as the importance of this term cannot be overstated. Sovereignty is one of the most recurring legal terms and is possibly the oldest subject in international law. It has been described as "the cornerstone of international law."[2] The presence or absence of sovereignty determines the status of particular political entities. It determines the various substantive rights that a state may take advantage of in the international arena

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1 M.R. Fowler & J. M. Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (Pennsylvania: The Pennsylvania State University Press, 1995) at 4.

2 R. C. Gardner, "Taking the Principle of Just Compensation Abroad: Private Property Rights, National Sovereignty, and the Cost of Environmental Protection" (1997) 65 U. Cin. L. Rev. 539 at 540. See also, A. James, *Sovereign Statehood: The Basis of International Society* (London: Allen and Unwin, 1986).

and "the controlling principle of world order."[3]

The word "sovereignty" comes from the Latin word "*super*" meaning over or above.[4] This metamorphosized into the French word "*souverain*"[5] and has been described to mean among other things, "supreme authority".[6] The term presumes authority, supremacy and territoriality. A sovereign is one who has authority, that is, "the right to command and correlatively, the right to be obeyed."[7] The authority must, however, be coupled with supremacy as there are different levels of authority that are not necessarily sovereign. The highest in a chain of such authorities is the sovereign.[8] Territoriality defines the area and set of people over where and whom the sovereign rules.[9] All these three elements must be present in a figure to be deemed a sovereign.

There are varying categories of sovereignty, but two broad categorisations stand out: sovereignty can be defined from the external and the internal perspectives. From the external perspective, the supremacy of an authority is based on the assumption that the authority is "independent of any other earthly authority,"[10] in other words, immunity from external interference. It involves the specification of legitimate authority within a jurisdiction and the extent to which that

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3 J. B. Attanasio, "Rapporteur's Overview and Conclusions: of Sovereignty, Globalization and Courts"(1995-1996) 28 N.Y.U.J. Int'L L. and Pol.1 at 25.

4 F.X. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (The Hague: Kluwer Law International, 2000) at 17.

5 Luzius Wildhaber, "Sovereignty and International law" in Macdonald and Johnston eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (The Hague: Martinus Nijhoff, 1983) 425 at 425.

6 L. Oppenheim, *International Law* Vol. I - Peace 101(London: Longmans, Green, and Co.,1905) at 108.

7 R.P. Wolff, "The Conflict between Authority and Autonomy" in J. Raz, ed., *Authority* (Oxford: Basil Blackwell, 1990) 1 at 20.

8 *Ibid.*

9 D. Philpott, *Revolutions in Sovereignty* (Princeton: Princeton University Press, 2001) at 16-17.

10 *Ibid.*

authority can be exercised to the exclusion of any external entities. This includes the absolute control over a delimited geographic area and people. It is in this sense that the term is mostly used.

From the internal perspective, in theory, no authority is higher than that which is recognised in a state as the sovereign but, in practice, the internal affairs of a state are subject to its international rights and obligations.[11] Thus, the authority is no longer supreme. The sovereignty of a state is most relevant when it is dealing with bodies or forces it considers external to it and, from the internal perspective, when there are state versus citizen conflicts.

The term has also been used to connote amongst other things, domestic sovereignty, international legal sovereignty, and interdependence sovereignty.[12] Domestic sovereignty is used in the sense of the formal arrangement of political entities within a state, with the aim of exercising control within the borders of the said state.[13] International legal sovereignty denotes the practices associated with mutual recognition between independent geographical territories.[14] Interdependence sovereignty refers to the ability of authorities in recognised geographical territories to regulate the flow of goods, people, and services across the borders of their territories.[15]

As far as definitions go, the term is a reflection of its history. In the next section, the evolution of the term will be examined under two broad categories: traditional and non-traditional concepts of sovereignty.

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11 See Perrez, *supra* note 4.

12 S.D. Krasner, *Sovereignty Organized Hypocrisy* (Princeton: Princeton University Press,1999) at 3.

13 *Ibid.*

14 *Ibid.*

15 *Ibid.* at 4.

2.1.1 The Traditional Concept of Sovereignty

Traditionally, the term "sovereign" was understood to mean the highest and unquestioned authority. The term was introduced by authors in the late Middle Ages as a tool to postulate the independence of the Emperor and the Pope.[16] It was first a personal concept *cum* political idea which slowly evolved into a legal term. Although writers such as Goodman and Crick[17] suggest that the concept of sovereignty existed in Roman times, it is generally argued that the modern usage of the term began its evolution during the processes that led to the end of the thirty years of war in Europe.[18]

Before the Reformation, the view of the world was based on interlocking political and religious orders. Dukedoms and bishoprics uniformly derived their legitimacy from the Empire. As a result, economy, religion and policy constituted one indivisible entity, in which each person in the medieval society had a designated space perceived as ordained by a divine being and therefore permanent. The Empire as a religious *cum* political entity was seen as the unifying principle which gave legitimacy to all authority and the world system and its rulers.[19] The European society as it existed then could not, however, withstand the onslaught of the growth of agriculture, the development of cities, the expansion of the world market (and the resultant development of the economy) and the emergence of the class structure. So, gradually a new view of the world was established. The world's existence was no longer accepted as resting solely on the will of the divine

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16 J. Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995) at 88.

17 L. W. Goodman, "Democracy, Sovereignty and Intervention"(1993) 9 AM.U. J. Int'l L & Pol'y 1 at 27. See also Bernard Crick, "Sovereignty" in David L. Sills, ed., *The International Encyclopedia of the Social Sciences* Vol. 15. (New York: Macmillan and Free Press, 1968) 78.

18 R. B. Bilder, "Perspectives on Sovereignty in the Current Context: An American Viewpoint" (1994) 20 Can-U.S. L.J. 1 at 9.

19 Perrez, supra note 4 at 20.

being, it came to be perceived as an accumulation of resources available to human beings.[20]

One result of this perception was that laws and rules became enacted and codified for the ease of attending to the new development. These laws and rules gradually became identified with certain territories. The colonial discovery of the New World at the end of the 15th century and the Reformation in the early 16th Century[21] also changed the character of the society as it was known. The hitherto unlimited authority of the Pope and the Emperor was challenged. As a result of the foregoing, several religious wars and disturbances broke out in Europe. The Thirty Years War between 1618 and 1648 across Germany, Bohemia, Italy, France and the United Provinces, the fourth such religiously motivated war in Europe,[22] was the crowning episode of the change in the character of the society as it was known before then. The fabric of the United Medieval Christian Commonwealth was torn. On the one hand, there was the religious friction between Catholics and Protestants and, on the other, there was political conflict between the cities and the Crown. There was also the struggle for domination between Spain and France, and the struggle for authority over the Baltic Sea between Denmark and Sweden.[23]

In 1648, the wars were settled with the Peace of Westphalia where the most fundamental questions concerned the religious conflicts. This settlement was carried out while also confirming the sentiment expressed as the religious freedom of Augsburg (1555), when the religion of the local territorial ruler became the religion of his subjects.[24] This position further strengthened

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20 O. Kimminich, *Deutsche Verfassungsgeschichte* in Perrez, *ibid.* at 21.

21 *Ibid.*

22 K. J. Holsti, *Peace and War: Armed Conflicts and International Order 1648-1989* (Cambridge: Cambridge University Press, 1991) 34-37.

23 Perrez, *supra* note 4 at 21.

24 L. Gross, "The Peace of Westphalia1648-1948"(1948) 42 Am. J. Int'l. L. 1 at 22.

the position of the rulers as supreme. The confirmation of this formula continued the trend where the rulers had absolute authority over their subjects.

The settlement of these conflicts also marked a shift in paradigms in transforming "person-oriented laws" properly into "territory-oriented laws,"[25] with the principal of the territory holding ultimate sway. The contribution of the "Westphalian" concept of the legal identity of a state to the international legal order is that it provided order, stability and predictability in international relations, "since sovereign states are [now] regarded as equal, regardless of comparative size or wealth."[26]

After the war, the Empire was carved up into hundreds of smaller territories,[27] each with its own economic, political, and management system. This contributed in a significant way to the change in the pattern of international relations in Europe as it introduced an innate acceptance of the concept of sovereignty[28] with the attached duty to defend and protect these territories. The new international order marked by the adoption of the Peace of Westphalia was a confirmation of the earlier writings of some authors on what turned out to be the foundation of the non-traditional concept of sovereignty in international law.

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25 T. S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970) at 67-68.

26 G. Evans & M. Sahnoun, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001) at 12.

27 Perrez, *supra* note 4 at 22.

28 Kimminich, *supra* note 20 at 23.

2.1.2 The Non-traditional Concept of Sovereignty

There was a brief period between the traditional and current notions of sovereignty when the writings of Jean Bodin, Albertico Gentili, Thomas Hobbes and Hugo Grotius, to mention a few, contributed immensely to the evolution of the concept of sovereignty.

Jean Bodin was one of the main proponents of the theory of state sovereignty as it is currently known.[29] Bodin's definition of sovereignty as "the absolute and perpetual power of the state"[30] has been a key-reference for many of the subsequent theories on sovereignty.[31] The term was conceived first as an "absolute concept implying that states are totally independent with respect to the community of nations as a whole."[32] The perspective that sovereignty was "complete freedom of a state from control by any higher power claiming authority to regulate its acts"[33] was fostered by Bodin. In his words, "beside God, there is nothing higher on earth than the sovereigns."[34]

Bodin's *Les Six Livres De la Republique* [35] published in 1577 at the height of the civil war between Catholics and Huguenots was an attempt to restore order and security to France.[36] Bodin then tried to balance his definition of sovereignty as unconditional and unrestrained power by his seeming inconsistent argument that sovereign kings were subject to divine and natural law and

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29 *Ibid.* at 25-26.

30 J. Bodin, Sechs Bucher Ubere Den Staat(Buch I-III) 205 (P.C. Meyer-Tasched, Bernd Wimmer trans., 1981) in Perrez, *supra* note 4 at 14.

31 Perrez, *ibid.*

32 C. G. Fenwick, *International Law* (New York/ London: The Century Co., 1924) at 44-45.

33 *Ibid.* at 44

34 Bodin, *supra* note 30 at 15.

35 J.Bodin, *Les six Livres De la Republique* (Geneva: Le Juge, 1577).

36 J.A. Camilleri & J. Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Hants: Edward Edgar Publishing Limited, 1992) at 18.

were to respect the rights and liberties of free subjects.[37]

This thesis will not go into the polemics of Bodin's arguments encompassing limitation and absolutism at the same time. However, it may be apt to point out that his arguments on absolutism did not foreclose his identification of the limitation of the Sovereign. Bodin's conceptualization of sovereignty may well have formed the foundation for the non-traditional meaning and usage of the term.

Thomas Hobbes, like Bodin, wrote against the background of a civil war. He substituted a contract between the ruler and the ruled for one in which individuals agreed to submit to the state, resulting in a "commonwealth", a "leviathan" and, ultimately, justice.[38] For Hobbes, although all law derives only from the sovereign,[39] the sovereign only exists to provide security and freedom. Hobbes' view allows for rights to be enjoyed equally by individuals against the state. Accordingly, sovereignty by Hobbes' definition is restricted to the basic purpose for which individuals have originally covenanted to form a state, i.e., the preservation of their lives.[40] This is the source of the legitimacy of sovereignty. According to Hobbes, the terror of the state has to be legitimated by the "free will of the individual."[41] For Hobbes, the omnipotent sovereign is the only alternative to complete anarchy.[42] The Hobbesian focus seemed to be principally on the internal perspective of sovereignty. More than any of the writers discussed, Hobbes appears to view the limit to the omnipotence of the sovereign not as an international law notion, but as part of the concept of

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37 J. Hoffman, *Sovereignty*, (Minneapolis: University of Minnesota Press, 1998) at 37-38.

38 T. Hobbes, *Leviathan* (Middlesex: Penguin Books, 1968) at 382-383.

39 Hoffman, *supra* note 37 at 40.

40 *Ibid.*

41 *Ibid.* at 43.

42 Camilleri & Falk, *supra* note 36 at 19.

individual rights.

Alberico Gentili accepted a limitation of the freedom of states to do whatever they wished with their territories.[43] He eschewed the supremacy of international law over the independence of states. Gentili drew a parallel between the rights of states in international law and individual rights. An individual's rights to do whatever he or she wishes with his or her person or property stop where the rights of other individuals begin. In a similar manner, the exercise of the rights of a state are limited by the rights of other states.

Hugo Grotius is another theorist who rejected the doctrine that states enjoy unlimited freedom to pursue their interests. However, he subjected international society to the rule of law. According to Grotius, even the sovereignty of international law is limited.[44]

The above summations on the concept of sovereignty are founded basically on the European conception of sovereignty for several reasons. First, the notion must have meant little to the tribal communities which formed the civilizations of the South, as they were primarily organized around kinship, lineage and such other ties at the time. The ancient Chinese multi-state (and almost fused system of the ruler of the empire, the feudal lords and the princes) system cannot be described as conforming to the known system of sovereign states.[45] The ancient empires of Persia, Egypt and Rome have no bearing on the modern notion of multiple and contending, yet equal, sovereignties.[46] Second, Europe is widely regarded as the cradle of the modern sovereign state.[47]

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43 Gesina H. J. Van der Molen, *Alberico Gentili and the Development of International Law. His Life, Work and Times,* 2d. ed. (Leyden: A. W. Sijthoff, 1968) at 112.

44 H. Lauterpacht, "The Grotian Tradition in International Law"(1946) 23 BYIL 1.

45 Camilleri & Falk, *supra* note 36 at 12.

46 *Ibid.*

47 *Ibid.*

A third reason may perhaps be deduced from the European forum as the European nations colonised a larger part of the world. It therefore stands to reason that the European notion of sovereignty is the internationally accepted concept of sovereignty.

One of the elements of sovereignty that was introduced in the non-traditional evolution of the definition of sovereignty is the recognition that sovereignty need not lie in a single individual.[48] Sovereignty may reside in the people ruling through a constitution, the body of an agreed union e.g. the European Union, or even international law. This is a clear departure from the traditional usage of the term where an individual was the ruler, answerable to no one else on earth. The introduction of this element reduces the absoluteness in the sovereignty of states as hitherto known.

The question that may be asked at this point is whether the evolved concept of sovereignty affects the relationship of states to one another, and if it does, how? Although the traditional understanding of sovereignty still influences many political and legal statements as well as the conduct of states, for the purposes of usage in international relations and international law, the effect of the changing conception of sovereignty primarily on international law and, secondarily, on international environmental law is obvious from an examination of the history of the development of international law.

After World War I, the Covenant of the League of Nations[49] was established. It served the purpose of the immediate post-world war society. It established the procedural limitations of war by providing that members of the League were to stay any intentions of war during the time the League was considering any dispute. It therefore created a "presumption against the legality of war

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[48] A contrast to Bodin's view for instance.

[49] The Covenant of the League of Nations was in the Treaty of Versailles, June 28, 1919, Part I, 225 Consol. T.S. 189, 195-205, and other World War I peace treaties.

as a means of self-help."[50] The higher principles identified earlier as limits to the right of a sovereign to engage in war appear to have been invested in the international community. However, the Covenant of the League of Nations had to be updated after World War II. The needs of a post-war society called for a new agreement. The adoption of the Charter of the United Nations (UN)[51] in 1945 was, in a way, the beginning of a new order. One of its major achievements is that it imbued international society with order after the dissolution of the League of Nations and the attendant lack of organization. Article 2.1 of the UN Charter enshrines the principle of sovereign equality of states. Beyond that, the UN Charter prohibits the use of force.[52] Article 2.4 prohibits the threatened or actual use of force against any independent state (presumably including non-members), in respect of the concept of territorial integrity. As will soon be obvious, the practical application of international law does not allow for a rigid interpretation of Article 2.4.[53] The importance of this development is that the right of states to protect their territories underwent a corrosion until states' powers to do as they wished concerning their territories became subject to an international order under which they were forbidden to use force in their relation with other states. The only exception to Article 2.4 was the internationally acknowledged right to self-defence in Article 51 of the UN Charter. Customary international law has also been preserved, including the right of anticipatory self-defence.[54]

The introduction of the Universal Declaration of Human Rights of 1948 took the

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50 I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 57.

51 1 U.N.T.S. xvi (in force October 24, 1945) [hereinafter UN Charter]

52 See Art. 2.4 of the UN Charter, *ibid.*

53 It was pointed out, that it would be "too rigid a view" to assert that general international law and the Charter "rest exclusively on the principles of non-intervention and respect for sovereignty of the State." See C. Greenwood, "International Law and the NATO Intervention in Kosovo" (2000) I.C.L.Q. 926 at 929 in Celeste Poltak "Humanitarian Intervention: A Contemporary Interpretation of the Charter of the United Nations"(2002) 60 U. Toronto Fac. L. Rev. 1 at 20.

54 Evans & Sahnoun, *supra* note 26 at 12.

limitation of state sovereignty even a step further.[55] Not only did states no longer have absolute power over their territories, their absolute power over their subjects became limited. States could be taken before the international community for the infringement of the human rights of their subjects. Examples of treaties that exhibited this limitation on the traditional concept of sovereignty are the major human rights treaties: the International Covenant on Civil and Political Rights[56] and the International Covenant on Economic, Social and Cultural Rights,[57] both of 1966. These further contributed to the loss of state power, even within its territory, over its subjects.

The formation of the UN in 1945 created an arena for the expansion of the concept of sovereignty. Membership in the UN is the symbol of independent sovereign statehood and the rights that are attached to such status, but it is also a voluntary acceptance of the limitations and responsibilities resulting from UN membership. The ramifications of these limitations and responsibilities continue to be defined with time. A look at the operation of these rights, limitations and responsibilities shows the practical application of the non-traditional understanding of the term "sovereignty"– not only are agents of the state responsible to the citizens internally, but they are also responsible to the international community through the UN.[58]

In the field of environmental protection, Principle 21 of the Stockholm Declaration[59] restates the rights of a state to exploit resources within its territory. The customary law principle,

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55 *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (entered into force December 10, 1948).

56 December 16, 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171, 6 I.L.M 368 (acceded to by 89 states as of December 31, 1989 but not the United States; entered into force March 23, 1976).

57 December 19, 1966, 6 I.L.M. 360.

58 Evans & Sahnoun, *supra* note 26 at 13.

59 UN. Doc A/Conf. 48/14/Rev. 1(UN Pub. E.73, II.A.14) (1973).

though recognising the sovereign right of states over resources within their territories in Principle 21, also restates the responsibility of states to avoid causing environmental harm to other states by activities within their individual territories. It is obvious from the provision of this principle, however, that the old international order under which there was an association of independent states who only used the common forum to protect their individual interests had already been replaced by the newer order of international law where states had to respect one another's sovereignty and where a state's power to do as it wished was properly placed within the limits of international law. Also in the field of international environmental protection, Principle 21 recognizes that the right of a state to do as it wishes is expressly subject to the responsibility to ensure that damage is not caused to the environment of other states. Even beyond that, a state may not cause damage to the global commons which are not within the sovereign jurisdiction of any state.

Other examples of the expansion of the borders of the connotation of sovereignty are expressed in the following incidents. During the past decade, the UN has had to intervene in war-torn states including Iraq, Somalia, Haiti, Rwanda, Bosnia, Sierra Leone, Cambodia and Liberia.[60] The intervention of the UN certainly is not in line with the previous traditional conception of state sovereignty as absolute independence. The formation of the European Union and the adoption of a common currency by twelve of the fifteen member states is an exercise in integration which is another challenge to the concept of sovereignty as known.[61]

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[60] Philpott, *supra* note 9 at 3.

[61] On January 1, 1999, the Euro became the electronic currency for 12 Member states of the EU (Belgium, Germany, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal and Finland and Greece when it joined the euro zone on January 1, 2001). Between January 1, 2002 and February 28, 2002 the Euro banknotes and coins came into circulation and the national banknotes and coins of individual member states of the EU were finally withdrawn from use.

In the same manner, issues concerning the environment have prompted actions that would traditionally have constituted infringements of state sovereignty. Environmental treaties are aimed at transforming behavioural patterns and they attempt to bind individual state governments to undertake certain regulatory policies and actions.[62] They are the hallmarks of the evolution of sovereignty as interdependence, leading to an incursion into what were formerly domestic spheres of rule-making.[63] Treaties currently address what individuals do, buy, eat, drive and so on, with the aim of transforming individual and corporate behaviour. To do this, the environmental agreements bind states who become signatories thereto, sometimes mandating a particular set of policies to be generated domestically. When this happens, sometimes it results in protests by certain states claiming infringements on their sovereign status, thereby bringing in conflict between sovereignty and a desire at transformation of international action.

The proliferation of newly independent states in the late 1950s and the 1960s introduced an upsurge in the number of participating third world countries. As at the time the UN was established, twenty of its fifty-one member nations were from Latin America, eight from Asia and only three from Africa.[64] Membership in the UN, however, exploded after the appearance of the new nations and, by the end of the 1960s, there were 127 member states from all over the continents.[65] The change in the structure of the UN necessitated a change in the structure of the international community. As the Saudi Arabian delegate to the 1958 Law of the Sea Conference put it "...the Law

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62 Kal Raustiala, "Democracy, Sovereignty, and the Slow Pace of International Negotiations" (1996) 8:1 International Environmental Affairs 3 at 7.

63 *Ibid.*

64 Wang Tieya, " The Third World and International Law" in R. St. J. Macdonald & D. M. Johnston, eds., *Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (The Hague: Martin Nijhoff Publishers, 1983) at 958.

65 *Ibid.*

of Nations was made by some states, nations and some Empires, and the other countries are merely the objects of the law, not its subjects.... Such international law must come to an end and we cannot permit it to exist any longer."[66] This statement probably represents the sentiments shared by the then newly independent states and, as some writers believe, developing countries are inclined to view international law as a system imposed on them by developed countries.[67] This may also explain the different attitudes of the developed and developing countries which will be discussed later.

Considering the earlier discussion on sovereignty, how has the attempt to solve environmental problems fitted into the evolving conception of sovereignty? How has the evolving international legal order patterned itself after the new structure of the international community especially as it concerns the environment?

2.2 The Concept of "Global Partnership"

The "environment" is nowhere defined in any of the major treaties, declarations or guidelines.[68] This has been ascribed to the fact that "it is difficult both to identify and to restrict the scope of such an ambiguous term, which could be used to encompass anything from the whole biosphere to the habitat of the smallest habitat or organism."[69] It has even been suggested that the term should include "artificial structures and spaces that are beneficial to humans or to other

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66 *Ibid.* at 959.

67 James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. (Oxford: Clarendon Press, 1963) at 43.

68 P. Birnie & A. Boyle, *International Law & the Environment*, 2d ed. (Oxford: Oxford University Press, 2002) at 3.

69 *Ibid.*

components of the environment."[70] There are oblique references to the meaning of the word "environment" but there appears to be a universal "understanding" to avoid a succinct definition that will govern dealings with the environment in the international fora. This might be because "it is a term that everyone understands and no one is able to define."[71] It may also be in a bid to avoid future controversies about what does or does not form part of the environment. Currently though, individual treaties define the scope of the international consensus on environmental issues.

The growing concern for the well-being of the environment may be ascribed to:

- The universal character of environmental issues. Certain aspects of the environment are not constrained inside individual territories. This makes it all the more necessary to cooperate on the use of and solutions to the misuse of the environment.
- Environmental problems are interconnected. For instance, deforestation contributes to desertification and, subsequently, poverty. Air pollution and acidification play a part in degradation of forests and lakes.
- Some areas of the environment are not under the jurisdiction of any particular state. These are known as common areas and include the high seas and outer space. They are further divided into areas that are *res communis,*[72] *res nullius* [73] or part of the common heritage of humanity.[74] If these were left without any control, the resulting degradation from lack of

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70 D. Gibson "Constitutional Entrenchment of Environmental Rights" in N. Duple, ed., *Le Droit a la Qualite de L'environment* (Montreal: Quebec Amerique, 1988) 275 at 287.

71 L. Caldwell, *International Environmental Policy and Law* 1st ed. (Durham: NC, 1980) 170, in Birnie & Boyle, *supra* note 68 at 4.

72 These are used by all but within the jurisdiction of none, e.g. the high seas.

73 These are used by no one but capable of being claimed as part of a nation's territory.

74 This territorial concept recognizes the benefits of the shared management of a common international area.

regulation will affect all.

- The environment and other aspects of human life, e.g., commerce, health and politics, are inexorably connected and, as a result of this connection, economic development patterns are a reflection of environmental problems. For instance, agricultural policies may lie at the root of land, water and forest degradation; energy policies lie at the root of global warming; and population growth contributes to poverty .

In many cases, environmental problems are regional in extent. These are regulated by regional organizations and treaties. Many environmental problems are, however, global in nature and they affect all states. So, to that extent, they require global solutions.

The concept of global partnership stems from the principle of "good neighbourliness" as propounded in Article 74 of the UN Charter. This principle is considered in relation to the maxim *sic utere tuo, et aliemum non laedas* (a common law maxim meaning that one should use his or her property in such a manner as not to injure that of another)[75] which has in some instances been invoked as a rule of international law.[76]

Apart from the legal principle of good neighbourliness, there is also the "common responsibility" principle. This describes the responsibility of two or more states toward the protection of an environmental resource. This can be in specific terms, i.e., a particular shared resource between two or more states, or a resource that is not the "property of, or under the exclusive jurisdiction of,

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75 H. C. Black *et al.*, *Black's Law Dictionary*: definitions of the terms and phrases of American and English jurisprudence, ancient and modern (St. Paul, Minn.: West Pub. Co, 1991) at 1380.

76 The maxim was invoked by Hungary as a "fundamental rule"in the *Gabcikovo-Nagymaros Project* Case (Hungary v. Slovakia, I.C.J judgment of September 25,1997: (1998) 37 I.L.M 162) mentioned in Phillippe Sands, *Principles of International Environmental Law I: Frameworks, Standards, and Implementation* (Manchester: Manchester University Press, 1995) at 197.

a single state",[77] more specifically, a common resource or property like the *res communis*.

Global partnership as a concept was formally adopted in Principle 7 of the 1992 Rio Declaration on Environment and Development[78] which provides that "[S]tates shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem." The principle of global partnership is reflected in many treaties and international conference declarations and is fast becoming customary international law. Principle 24 of the Stockholm Declaration, for instance, reflects a global decision to cooperate in environmental protection matters. Activities in the international fora also support the existence of such a global decision.[79]

Since the 1972 United Nations Conference on The Human Environment which resulted in the Stockholm Declaration, there has been a steady growth of the realization that the shared needs and interests of nation states can only be realized with the efforts of all. This has further resulted in the recognition of principles of international law. Although the status of these principles is not universally agreed upon, there exist an increasing number of instruments have adopted these principles:

a. the principle of sustainable development;

b. the precautionary principle;

c. the protection of the climate for "the benefit of present and future generations";

d. the principle of common but differentiated responsibilities – based on respective capabilities; and

e. the principle of permanent sovereignty over natural resources.

The discussion of these principles is meant to aid in examining the foundation for the emerging pattern of the seeming attempt to compromise sovereignty for a partnership aimed at conserving and

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77 *Ibid.* at 218.

78 14 June 1992, A/ CONF.151/26(Vol. I); (1992) 8, 31 I.L.M. 874 [hereinafter Rio Declaration].

79 Sands, *supra* note 76 at 198.

protecting the environment.

2.3 Some Evolving Principles of International Law

a. Sustainable Development

Sustainable development, a soft law concept, is one of the pivots of most environmental treaties. The idea underlying the principle is that states should give consideration to the well-being of the environment in the use of their natural resources and moves toward development. The term is believed to have been coined by the 1987 Commission on Environment and Development (also known as the Brundtland Commission) Report.[80] The Brundtland Commission defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[81] According to the Commission, sustainable development "is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, the institutional changes are all in harmony and enhance both current and future potential to meet human needs and aspirations."[82]

The definition of sustainable development takes into consideration the following other elements that are themselves (though in some quarters debated) principles of international law:

- The use and preservation of natural resources in a way that it will be beneficial to future generations;
- The implication that the use of natural resources by a state should take into account the needs of other states;
- That there are other developmental needs and environmental objectives take such into

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80 World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

81 *Ibid.* at 43.

82 *Ibid.* at 46.

account; and

- The sustainable exploration of natural resources.[83]

Some of these elements will be discussed below. It is not easy, though, to identify the precise meaning of sustainable development, although it is a key element of a number of international agreements. In addition, Agenda 21,[84] the programme of action adopted by the United Nations Conference on Environment and Development (UNCED) of 1992 in its preamble, refers to the need for a "global partnership for sustainable development."

The principle has produced different reactions from the North and the South when being applied in practical terms. One major example of this is seen in the climate change regime.[85] The reluctance of developing countries is grounded in their concern that the attempt to set limits on their greenhouse gas (GHG) emissions is an attempt by developed countries to stifle their development. Underlying this concern is the deeper concern of external interference in the decisions that are made by states and, consequently, their sovereignty. Developing countries have consistently supported and drawn upon the principle of sovereignty which is at the core of the Five Principles of Peaceful Coexistence.[86] The arguments put forward by the developed countries are couched in what is known as the principle of sustainable development. Unfortunately, it is a question of global warming and sustainable development and the North and the South do not agree on the modalities for addressing one and fostering the other simultaneously.

Another instance is debate on the protection of the Amazon forests. There are several reasons for international interest in the protection of the forests. Not only do they hold one-third of

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83 Sands, *supra* note 76 at 199.

84 The programme of action adopted by the United Nations Conference on Environment and Development (UNCED) of 1992 in Rio de Janeiro.

85 See Karin Mickelson, "South, North, International Environmental Law, and International Environmental Lawyers" (2000) 11 Yearbook of International Environmental Law 52 at 70 at 74-77.

86 See Tieya, *supra* note 64 at 968. The Five Principles are : mutual respect for territorial integrity and sovereignty; mutual non-aggression; non-intervention in each other's domestic affairs; equality and mutual benefit; and peaceful coexistence. It appears to me that the first three principles are reiteration of the customary law of state sovereignty. See also, Poltak, *supra* note 53.

the world's rainforests, they are formed of several associated ecosystems.[87] However, the international interest has been interpreted to be an intention "to expropriate Amazonia, awarding executive authority to an *ad hoc* [sic] international Brazilian territorial jurisdiction over the area."[88] To date, there has not been much success in negotiations toward an international agreement to halt deforestation as the Amazon forest of Brazil is one important area in the negotiations.

The principle of sustainable development is one that holds different meaning for the North and South. Therefore, when an attempt is made to incorporate the spirit and intent of the principle in treaties in practical terms in the spirit of global cooperation, there is usually one party to the negotiations that sees implementation of sustainable development as not being feasible.

b. The Precautionary Principle

The spirit of the precautionary principle is that where there is scientific uncertainty as to the outcome of certain actions, precautions reducing the possible risks must still be taken. The purpose of the precautionary principle is to allow for less uncertainty in the regulation of environmental risks and for a more sustainable use of natural resources.[89] For instance, it is a feature of the Rio Declaration in Principle 15.[90] There is no universal acceptance of the status of the term, although some members of the international community are apt to accept it as a principle of customary international law.[91] Commentators are not even agreed upon the correct terminology for

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87 S. C. Vieira, "Sustainable Development as a Matter of Good Governance - The Case of the Amazon Forest in Brazil" in K. Ginther, E. Denters & P.J.I.M. de Waart, eds., *Sustainable Development and Good Governance* (Dordrecht: Martinus Nijhoff Publishers, 1995) 429 at 430.

88 *Ibid.* at 431.

89 *Ibid.* at 104.

90 *Rio Declaration on Environment and Development*, 31 I.L.M.874 (1992).

91 See Viera *supra* note 87. See also the *Montreal Protocol on Substances That Deplete the Ozone Layer*, ((1987) 26 I.L.M. 1541 at 1551, entered into force September 16, 1987); the *United Nations Framework Convention on Climate Change* ((1992) 31 I.L.M. 849, entered into force on May 9, 1992) [hereinafter UNFCCC]and the *Biodiversity Convention* ((1992) 31 I.L.M. 818, entered into force on June 5, 1992). It was also adopted in the 1995 *United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks* (UNGA, U.N. Doc. A/CONF. 164/37 ((1995) 34 I.L.M. 1542 entered into force on September 8, 1995) and the *Ministerial Declaration of the Second Conference on the Protection of the North Sea*

the concept it seeks to convey. One view is that it is a binding legal principle and another is that it is only an approach.[92]

The principle is said to be the most developed form of prevention for environmental protection measures.[93] Traditionally, environmental agreements called on parties and their institutions to adopt decisions based on scientific findings, suggesting this as the lone basis for environmental action. However, by 1969, this traditional approach became evidently limiting. Thus, environmental treaties began to consider the possible range of environmental harm resulting from dependence on scientific findings alone as basis to act in prevention of harm.[94] Although the precautionary principle has no uniform meaning, it is increasingly shifting the traditional burden of proof from the party opposing an activity to the party proposing to carry out the activity.

The precautionary principle imposes an obligation of diligent control and regulation. It does not allow states to proceed with proposed activities "on the basis that a risk of harm has not been proved conclusively."[95] This appears to be a measure of infringement on the traditional concept of sovereignty. The effect of this principle on the concept of sovereignty is that it subjects actions of a state to scrutiny by the international community even if such actions are wholly within its territory.

For states in the South, this principle is often not very feasible to implement as they lack the scientific means and human resources to ensure precaution within the meaning of this principle. During treaty negotiations, there are usually promises by the states of the North to provide these means, for instance by technology transfer, but the implications for sovereignty of the states in the South are far-reaching to say the least. This is because the North gets to determine what activities can proceed within the territories in the South based on feasibility determined by the North.

(also known as the London Declaration) ((1988)27 I.L.M. 835 at 840), just to mention a few.

92 Birnie & Boyle, *supra* note 68 at 116. See also, David VanderZwaag, "The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces" (1998) 8 J. Env. L. & Prac. 355.

93 Kiss & Shelton, *International Environmental Law*, 2nd ed. (New York: Transnational Publishers, Inc., 2000) at 265.

94 Sands, *supra* note 76 at 209.

95 Birnie & Boyle, *supra* note 68 at 117.

c. The Protection of the Environment for the Benefit of Present and Future Generations[96]

The concept of an equitable balance between the economic, social and environmental needs of the present and future generations,[97] and the need for a foundation for a global partnership between developed and developing countries, governments and sectors of civil society, based on a common understanding of shared needs and interests, became the focus of international society – especially within the purview of the growing list of international environmental problems and disasters.

The general principle – that states should use their resources in such a way as to ensure that the earth is preserved for the use and enjoyment of the future generations for whom we hold it in trust – is not new. As early as 1946, international agreements recognized the use of natural resources with consideration for "future generations".[98] Principle 3 of the Rio Declaration of 1992 provides that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." What is new is the attitude that the principle results in the soft law non-binding obligation of members of this generation to come together in the effort to preserve the resources for future generations. This probably explains why the newer environmental treaties are focussing on the notion of "common concern".

There are a number of relationships that shape any theory of intergenerational equity in the context of our natural environment: our relationship to other generations of our own species and our relationship to the natural system of which we are a part. The human species is integrally

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96 This principle is also known as the theory of inter-generational equity.

97 This is the rationale behind the soft law notion of "sustainable development". See for instance, Principle 3 of the Rio Declaration. See also The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (known as The Hague Convention) entered into force on August 7, 1956 and the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (The World Heritage Convention) ((1972), 11 I.L.M. 1358 (entered into force 17 December 1975)) both managed by UNESCO, and the UNFCCC, *supra* note 91.

98 See for instance, the International Convention for the Regulation of Whaling (entered into force10 November 1948) amended 1956, 338 U.N.T.S. 366.Oonline:<http://sedac.ciesin.org/entri/texts/intl.regulation.of.whaling.1946.html>(date accessed: 11 March 2004).

linked with other parts of the natural system.

Another fundamental relationship is that between different generations of the human species. All generations are inherently linked to other generations, past and future, in using the common patrimony of earth. The theory of intergenerational equity stipulates that all generations have an equal place in relation to the natural system.[99]

The principle of intergenerational equity is one of the pivots of global partnership. In theory, states are dedicated to the joint preservation of the environment for future generations. In practical terms, however, countries of the South are devoting their resources mainly to keeping the present generation alive, healthy, housed, fed and sheltered. Thus, the focus of the South appears to focus on a notion of intra-generational equity instead. The notion of intra-generational equity is based on the belief that all life forms in the same generation are equally entitled to the exploitation of resources and the access to a clean and healthy environment.[100] The argument has been proffered that both theories applied together increase access to the benefits offered by the environment and "imposes comparable obligations to care for it so that it is passed on, in balance, in no worse condition than it was received."[101]

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99 For more on the principle of intergenerational equity, see Edith Brown Weiss, *Environmental Change and International Law: New Challenges and Dimensions* (Japan: United Nations University Press, 1992).

100 See Ben Boer, "Institutionlising Sustainable Ecological Development: The Roles of National, State and Local Governments in Translating Grand Strategy into Local Action" (1995) 31 Willamette L. Rev. 307 at 320.

101 Edith Brown Weiss, "A Reply to Barresi's "Beyond Fairness to Future Generations""(1997) 11 Tul. Envtl. L.J. 89 at 91.

d. The Common but Differentiated Responsibilities Principle (CBDR)

"Those living in desperate poverty ought not to be required to restrain their emissions, thereby remaining in poverty, in order that those living in luxury should not have to restrain their emissions."[102] Although this statement was made in reaction to the attempt to foist reductions in greenhouse gas emissions on developing countries, it also represents the attitude of developing nations to the overall issue of global cooperation. The notion of different levels of responsibilities for different nations, known as the common but differentiated responsibilities (CBDR) principle, recognises the needs and capabilities of different countries set on the basis of a range of factors, including special needs and circumstances, future economic development and states' contribution to causing environmental problems.

The CBDR principle is aimed at redressing the imbalance in wealth between the developed and developing nations and giving priority to the needs of the poor. In other words, intragenerational equity as a principle seeks to balance the current inequity between the developed and developing countries.[103] This phrase captures two major elements of international relations. One element is the common responsibilities of states for the protection of the environment at all levels. The other element is recognition of the different contributions of the North and the South to the environmental problem sought to be addressed, controlled or prevented.[104] Apart from the contribution of states to the problem, the principle also considers the capacity of individual states to combat environmental problems. As a result, there is a recognition that the North and the South vary in the strength of their contributions to addressing environmental problems.[105] This is not to suggest that the CBDR principle is restricted to treaties between developed and developing countries. The

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102 C. Batruch, ""Hot Air" as Precedent for Developing Countries? Equity Considerations" (1998/1999) 17 UCLA J. Envtl. L. & Pol'y 45 at 50.

103 Birnie & Boyle, *supra* note 68 at 91.

104 Sands, *supra* note 76 at 217.

105 *Ibid.* at 100.

1988 European Community (now European Union (EU)) Large Combustion Directive sets different levels of emission reductions for each member state.[106]

The CBDR Principle has important precedents in international law. Principle 23 of the 1972 Stockholm Declaration on the Human Environment provides that it is essential to consider "the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for developing countries."[107] Article 30 of the United Nations Charter of Economic Rights and Duties of States[108] provides that "[T]he environmental policies of all states should enhance and not adversely affect the present and future development potential of developing countries."

The CBDR Principle is codified in Principle 7 of the Rio Declaration on Environment and Development, providing that:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[109]

The CBDR principle is one of the major cornerstones of international relations and treaty-making in the environmental protection area.[110] It has been pointed out that the soft law

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106 Council Directive 88/609/EEC of November 24, 1988 (on limitation of emissions of certain pollutatnts into the air from large combustion plants) as amended, OJ L 336 December 6 1988. See Sands, *supra* note 76 at 219.

107 16 June 1972, UN Doc. A/Conf.48/14/Rev.1 (UN Pub. e.73, II.A.14), 11 I.L.M. 1416 [hereinafter Stockholm Declaration].

108 G.A. Res. 3281, 29 U.N.G.A.O.R. Supp. No. 31, (A/9631).

109 *Supra* note 78.

110 These different levels of obligations are obvious in treaties such as the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), both of which will be discussed in the subsequent chapters. The CBDR principle is sought to be codified in Article 10 of the Kyoto Protocol, which provides that all

principle can reflect totally different ways of thinking about the roles of the North and South in addressing environmental degradation, depending on the perspective brought to bear on it.[111] It can, on the one hand, reflect a "pragmatic acceptance of, and response to, the fact of differing levels of financial and technological resources available to countries in different economic circumstances."[112] On the other hand, it can reflect "an acknowledgement of the historic, moral, and legal responsibility of the North to shoulder the burdens of environmental protection, just as it has enjoyed the benefits of economic and industrial development largely unconstrained by environmental concerns." [113] This thesis employs the term with the former view.

e. The Principle of Permanent Sovereignty over Natural Resources (PSNR)

Principle 21 of the Stockholm Declaration restates the rights of a state to exploit resources within its territory.[114] It recognises the sovereignty of states over resources within their jurisdictions and affirms the corresponding obligation not to cause environmental harm to other states by activities within their territories.[115] The concern of developing countries is that the attempt at global cooperation, for instance on the issue of climate change, may infringe on their right to deal with their natural resources as they see fit. This concern is predicated on the fact that the problem of climate change touches upon certain issues which ordinarily are subjects of national sovereignty, such

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Parties must consider "[T]heir common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, without introducing any new commitments for Parties not included in Annex I..."

111 Mickelson, *supra* note 85 at 70.

112 *Ibid.*

113 *Ibid.*

114 *Supra* note 59.

115 The decisions of the international arbitration tribunal in the *Trail Smelter Arbitration* (U.S. v. Canada (1931-1941) 3 RIAA 1905); the International Court of Justice in *Corfu Channel* (Merits) (U.K. v. Albania) 1949), I.C.J. Rep. 4.; and tribunal in the *Lac Lanoux Arbitration* (France v. Spain) (1957), 12 RIAA 281, are evidence of the development of this customary law principle.

as forestry and the production of fossil fuels. The understanding in the international community is that Principle 21 is not an absolute right.[116] The right of a state to do as it wishes is subject to the responsibility to ensure that damage is not caused to the environment of other states or areas beyond national jurisdiction. The concept of state independence is more obviously limited in the application of this principle. There is a conception of the customary law principle of permanent sovereignty over natural resources (PSNR) as limited and subject to international law.[117] This of course is the bane of treaty negotiations between the North and the South.

2.4 Conclusions

The understanding of the concept of sovereignty has evolved from the unlimited power of rulers to do what they wished within their territories – in other words, absolute, unfettered independence from external interference in internal affairs, to customary international law that recognises the rights of states to do as they wish within the limits of positive international law.[118] Thus sovereignty has further developed to the concept that even international law is limited by the rule of law.

Although the evolving principles of international law discussed above are important,[119] there is a major controversy about the status to be ascribed to these principles.

When the Statute of the Permanent Court of International Justice was being drafted, a group of the relevant preparatory committee thought that the sources of international law traditionally recognized, i.e., custom and treaty, should be expanded to enable the Court to apply "the

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116 Perrez, *supra* note 4 at 74.

117 *Ibid.* See also the preceeding discussion on PSNR and the customary law principle of "no transboundary harm" in Chapter 2.3.e, *supra,* text accompanying note 115.

118 Positive international law to which states by the way, contributed in creating.

119 Birnie & Boyle, *supra* note 68 at 18.

rules of international law as recognized by the legal conscience of civilized nations."[120] The rationale behind this was that certain principles existed in "natural law", principles of "objective justice" identifiable by all rational human beings. There was opposition to expansion of the accepted sources of international law and a compromise had to be adopted.[121] The opposition was based on the fact that the principles do not rest on the free will of states. Article 38 (1) (a)-(c) of the 1946 Statute of the current International Court of Justice states :

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;...[122]

The compromise limited the general principles accepted by "civilized nations" to those applied in their municipal systems.[123] In practice, international courts have relied on these principles as support for different determinations and not as the bases for the conclusions themselves.[124]

Certain issues arise from the intersection of jurisdictional *status quo* and the global trends in international environmental law. International law has long abandoned the original idea of sovereignty that a state is wholly free to pursue whatever activities it wants within its own territory.[125] In 1928, Umpire Max Huber in the *Island of Palmas* Arbitration, defined sovereignty as independence "... in regard to a portion of the globe that is the right to exercise therein, to the exclusion of any

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120 A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) at 170.

121 Birnie & Boyle, *supra* note 68 at 19.

122 Online: Cornell Law School<http://www.lawschool.cornell.edu/library/cijwww/icjwww /ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_II> (date accessed: 11 March 2004).

123 Birnie & Boyle, *supra* note 68 at 19.

124 *Ibid.* at 19-20.

125 Ian Townsend-Gault, "Regional Cooperation Post -UNCLOS/UNCED: Do Boundaries Matter Any More?" in G. Blake *et. al.*, eds., *International Boundaries and Environmental Security* (London: Kluwer Law International, 1997) 3 at 3.

other State, the functions of a State."[126] The concept that the rights of other states can be affected adversely by what happens wholly within the areas within the sole jurisdiction of a state acts as a limiting factor to the absolute rights that any state may earlier have had over its territory.

From the preceding examination of sovereignty, and the conclusion that it has come to mean interdependence through natural and human systems, certain other issues arise.

The principal instruments of formal international cooperation are international organizations[127] and multilateral treaties. It is in the negotiations of these agreements that the difficulties that beset global cooperation are most pronounced. Collective decisions are difficult to take for obvious reasons. One of these reasons is that there is an absence of a central authority above the nation state. It may be argued that the UN serves surreptitiously as the central authority, but that argument is faulty in several respects. Primarily, the concept of sovereignty itself acts as a protector against an increasing democratic deficit in international rule-making decisions. In a secondary sense, since membership in the UN implies consent, a state may renounce such consent by withdrawing its membership in the UN.

Another reason for the difficulty in arriving at collective decisions is the provision for ratification of international agreements.[128] Although ratification provides some measure of democratic control over proposed decisions taken at the international level,[129] it has the effect of stalling such decisions. Even if it were easy to arrive at collective decisions, there are other hurdles to be overcome. The effectiveness of international agreements is predicated not only on the intent of a state to be bound by the agreement, but also its capacity to do so. The intent of a state is expressed by its ratification of an agreement. Capacity is not uniform and developing countries, more often than not,

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126 UNRIAA 2 829 at 838 in Wildhaber, *supra* note 5 at 437.

127 The primary international organization is the United Nations.

128 Ratification is the formal approval of a treaty by a state.

129 Raustiala, *supra* note 62 at 6.

lack the resources to fulfill their obligations under treaties.[130] They usually have fewer trained personnel, less technology and technological know-how and, perhaps more important, less financial resources. This explains further the rationale for the principle of common but differentiated responsibilities. It also explains the reason for the different attitudes assumed by the North and the South.

From the foregoing, at least two points are obvious. The first is that, although environmental problems present a challenge as they do not limit themselves to a geographic territory, the impetus to address them collectively as is necessary is not so simple. The second point is that the principles that underlie the need for international cooperation do not have a definitive status. It becomes increasingly obvious then, that as a customary norm, sovereignty based on the free will of states may appear to be at loggerheads with the general principle of global partnership in addressing the international environmental problems.

As mentioned earlier in this chapter, the apparent inadequacies of individual states to address environmental problems because of their peculiar nature necessitates cooperation of some kind between sovereign states. However, the substantive nature of the requirement of cooperation is largely undetermined; hence the seeming conflict between the customary law of state sovereignty and global partnership in different regimes.

In the next chapter, the Kyoto Protocol to the United Nations Framework Convention on Climate Change will be examined to: (a) assess the positions of states along the North-South divide on the basic tenets of sovereignty and global partnership on environmental issues, (b) discover how these positions have affected the agreement, and (c) reassess the future of the environment as long as the *status quo* exists.

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130 See Harold K. Jacobson & Edith Brown Weiss "Assessing the Record and Designing Strategies to Engage Countries" in Edith Brown Weiss & Harold K. Jacobson, *Engaging Countries: Strengthening Compliance With International Environmental Accords"* (Massachusetts: MIT Press, 1998) 511 at 529-535.

CHAPTER 3

THE FRAMEWORK AND TREATY MECHANISMS OF THE KYOTO PROTOCOL

The Kyoto Protocol[1] to the United Nations Framework Convention on Climate Change (UNFCCC)[2] is a classic example of the North-South attitudes and capacities for contributing toward global partnership to address environmental problems. It is relevant to the discussion in this thesis, not because it is the most effective environmental treaty or because it proposes to deal with the worst environmental problem, but because it is a current example of what happens when the issues examined in chapter two – the environmental principles, the customary law concept of sovereignty and the emerging notion of global partnership – are juxtaposed in an international environmental agreement. The examination of the treaty mechanisms in the climate change regime is targeted toward understanding the silent underpinnings of international environmental law and relations. There have been well-known political debates on the North-South angle of views on the environment and, in some cases leading to stalemates on environmental issues.[3] It is against this background then that this chapter will examine the climate change regime, its effectiveness and its proposal to use mechanisms involving developing countries in a way no other international environmental agreement has likely done before.

Nowhere is the global nature of environmental issues more evident than on the issue

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1 *Kyoto Protocol to The United Nations Framework Convention on Climate Change,* December 10, 1997, 35 I.L.M. 1165; online: UNFCCC <http://unfccc.int/ resource/docs/convkp/ kpeng.html> [hereinafter the Protocol] (date accessed: 12 March 2004).

2 *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849; online <http://unfccc.int/resource/conv/conv.html> [hereinafter UNFCCC or Climate Change Convention or the Convention] (date accessed: 12 March 2004).

3 On the issue of a framework Convention on deforestation for instance, there is a stalemate.

of the climate problem. This agreement is thus suitable for a discussion of the global attempt at cooperation on the issue of environmental protection. The impacts of global warming are being felt all over the world but not every part of the world is equipped to deal with these impacts.[4] That is the more important reason why the usual demarcation along the North-South axis during treaty negotiations should have, in this instance, been turned into an advantage.

It was understood from the beginning that the Kyoto Protocol is not the cure-all for global warming.[5] However, any effort toward the reduction of emissions will help in making the environment a cleaner one than it currently is. This is why the aspiration of the UNFCCC to limit the emissions of greenhouse gases (GHGs) is important to the well-being of the environment. The manner in which the Convention aims to achieve its aspirations against the background of the attitudes of the North and the South to environmental issues is of relevance to this thesis. This chapter will, therefore, examine the feasibility of the Clean Development Mechanism (hereinafter "CDM" or "the Mechanism") of the Kyoto Protocol to the UNFCCC within the political and legal context of the attempt at cooperation between the developed and developing nations on the issue of climate change. The choice of this particular mechanism is predicated on the appearance of the Mechanism as an instrument that typifies the attempt at global cooperation to address the climate change problem. The discussion of the climate change regime will be placed, on the one hand, against the background of the global nature of the climate problem and the dire need to address the problem and, on the other

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4 See Harold K. Jacobson & Edith Brown Weiss "Assessing the Record and Designing Strategies to Engage Countries" in Edith Brown Weiss & Harold K. Jacobson, *Engaging Countries: Strengthening Compliance With International Environmental Accords* (Massachusetts: MIT Press, 1998) 511 at 529-535.

5 Roberta Mann "Waiting to Exhale?: Global Warming and Tax Policy" (2002) 51 Am. U.L. Rev. 1135 at 1141-1142.

hand, the notion of a nation's right to do as it deems fit with its natural resources.

3.1 Background to the Climate Change Regime

In the 1970s, scientists began to understand the reasons for the concerns and warning of Swedish scientist Svante Ahrrenius in the 19th century. Their growing understanding of the earth-atmosphere system confirmed the 1896 warning by the Swedish scientist that carbon dioxide emissions could lead to global warming.[6] As a result of this understanding and the desire to explore the issue of climate change further, the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) established the Intergovernmental Panel on Climate Change (IPCC). The objectives of the Panel included assessing the available information on the climate system, the impacts of the world systems on climate change (and *vice versa*) and climate change. The Panel was also to examine the possible responses to the information so examined.[7]

The IPCC, in its first Assessment Report in 1990 to the Second World Climate Conference held in Geneva,[8] confirmed that there were scientific findings to support evidence of climate change. It findings included the facts that:

- Deforestation intensifies the effect of carbon dioxide which is the by-product of burnt fossil fuels;

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6 Sebastian Oberthur & Herman Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century*, (Berlin: Springer, 1999) at 3.

7 "Combating Global Warming: The Climate Change Convention" Special Session of the General Assembly to Review and Appraise the Implementation of Agenda 21 New York, 23-27 June 1997.

8 J .T. Houghton, G. J. Jenkins & J. J. Ephraums, eds., *Climate Change: The IPCC Scientific Assessment*--Report of Working Group I (Cambridge: Cambridge University Press, 1990); W.J. Mc Tegart, G. W. Sheldon, D.C.Griffiths (Eds) *Impacts Assessment of Climate Change — Report of Working Group II* (Australia: Australian Government Publishing Service, 1990); The IPCC Response Strategies — Report of Working Group III (Covelo, CA: Island Press, 1990).

- Greenhouse gasses trap heat in the atmosphere. The result of this is an imbalance in the "energy flows" of the climate system;
- The global temperature was predicted to rise by 1° - 3.5°C by the year 2000. These findings were based on the existing GHG emission trend;
- Based on the same emission trend, the sea level was expected to rise by 15-95 cm by the year 2100, causing flooding and the decline of forests, deserts, rangelands and other ecosystems; and
- Human society will face new economic, physical, agricultural and other risks and pressures as had never been known in the world.[9]

The Report by the IPCC was very instrumental in the UN General Assembly's decision to establish the Intergovernmental Negotiating Committee (INC) toward the goal of drafting a framework convention on climate change.[10] The Report supported a number of principles such as that the climate is a "common concern", countries have "common but differentiated responsibilities", the precautionary principle, sustainable development and other principles discussed in the preceding chapter. In response to the IPCC Report, the international community started negotiations for the UNFCCC.[11]

In its third Assessment Report of July 2001 to the 6th Conference of the Parties (COP) – the ultimate authority of the UNFCCC – to the Convention in Bonn, the IPCC confirmed its earlier

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9 "Combating Global Warming: The Climate Change Convention" *supra* note 7 at 1-2.

10 IPCC, online:<http://www.ipcc.ch/pub/reports.htm> (date accessed: 12 March 2004).

11 M. Grubb, C. Vrolijk & D. Brack, *The Kyoto Protocol : A Guide and Assessment* (London: Earthscan, 1999) at 26.

projections of 1990.[12] Its findings confirmed that:

- There have been atmospheric and global changes in the climate system. The temperature of the earth has risen by as much as 0.6 + 0.2°C since 1860;
- There have been changes in some regional precipitation patterns;
- The sea level has risen an approximate 10-20cm since 1900;
- Several non-polar glaciers have melted;
- The Arctic sea ice thickness of is decreasing in summer; and
- The increase in surface temperatures over the 20th century for the northern hemisphere is likely to be greater than that for any other century in the last one thousand years.

The Report also disclosed that carbon dioxide, surface temperatures, precipitation and sea level are all projected to increase globally during the 21st Century because of human activities. The projection of the IPCC is that, in the absence of climate change policies, the atmospheric concentration of carbon dioxide will increase significantly during the next century with climate models projecting that the earth will warm from 1.4 to 5.8°C and the sea level is projected to increase from 8 to 88cm between 1990 and 2100.[13] Biological systems are also affected. Bird migration patterns are changing and birds are laying their eggs earlier; the growing season in the northern hemisphere has lengthened by about 1-4 days per decade during the previous 40 years; and there has been a pole-ward and upward migration of flora and fauna.[14] Socio-economic sectors (e.g., agriculture, forestry, fisheries, water resources and human settlements), terrestrial and aquatic

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12 R..T. Watson, and the Core Writing Team, eds., *Climate Change 2001: Synthesis Report* Stand-alone edition. (Geneva, Switzerland: IPCC, 2001). See also "Third Assessment Report of the IPCC", online: IPCC <http://www.ipcc.ch/pub/SYRspm. pdf> (date accessed: 21 June 2003).

13 *Ibid.*

14 *Ibid.*

ecological systems and human health are also affected.[15]

The general shape of things was obvious. Carbon dioxide is the most important GHG produced by human activity and also the only GHG for which there are relatively accurate estimates of emissions. Thomas E. Drennen has calculated that the industrialized countries, with 15.7% of the global population, emit 48.5% of the carbon dioxide, while the developing countries (excluding China), with 51.9% of the population, emit 14.9% of the carbon dioxide, although the equation appears lopsided, with China accounting for 10.3% of the global carbon dioxide emissions with a population that is approximately 23.5% of the world population, while the Commonwealth of Independent States and Eastern Europe have 8.8% of the people and 26.2% of the carbon dioxide.[16]

Although the immediate effects of the above calamities are being felt all over the world, not all individual nations are equipped to deal with these effects. Countries in the South have had to channel their efforts toward more basic human needs of survival and developed countries of the North appear to be better equipped to deal with the problem of climate change. Unfortunately, the North cannot (and is not willing to) deal with the problem on its own. One of the main reasons for this is that the South is catching up with the North's volume of emissions quickly,[17] and this is the bane of the climate change regime. The developed countries have, therefore, attempted to foster a spirit of cooperation to deal with environmental issues. It is not suggested that all the reasons for

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15 *Ibid.*

16 T. E. Drennen, "Economic Development and Climate Change: Analyzing the International Response", 142 (1993) (unpublished Ph.D. Dissertation, Cornell University) in H. Shue,"After You: May Action by The Rich Be Contingent on Action by the Poor?" (1994) 1 Ind. J. Global Legal Stud. 343 at 365.

17 See the analysis in Hoong N. Young "An Analysis of A Global CO2 Emissions Trading Program" (1998) 14 J. Land Use & Envtl. Law 125 at 126-127.

attempts at cooperation to deal with these issues are altruistic on the part of the nations that are so equipped. The repercussions of the global climate change have ripple effects and when individual states are unable to deal with climate change in their particular states, this will affect several other aspects of the environment and, consequently, economic and social aspects of other nations' life. For example, the effect of cutting down forests in one country may contribute to deforestation in a country not equipped to deal with global warming and the deforestation intensifies further production of carbon dioxide in the atmosphere which is felt in all nations.

Developed countries stand to gain benefits from combatting climate change, such as reduced aggregate pollution, the creation of markets for exports of environmentally sound technology and the "proper management of natural resources that are important not only to the collective human security, but also to the success of private enterprise."[18] On paper, global cooperation benefits all. However, it appears that since, for the major part, the private enterprises that will benefit are in the North, and countries in the South really do not stand to gain (or lose) much from the cooperation to combat climate change, this may explain the reluctance of the South to commit to specific emissions reduction commitments. There are certain sacrifices to be made in the undertaking to combat climate change and these include cuts in GHG emissions which will affect the oil, natural gas, vehicle and energy industries in particular. These sacrifices are hinted at in the UNFCCC and especially in the Kyoto Protocol.

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[18] A.M. Halvossen, *Equality Among Unequals in International Environmental Law Differential Treatment for Developing Nations* (Colorado: Westview Press, 1999) at 67.

3.2 The Climate Change Regime

3.2.1 The United Nations Framework Convention on Climate Change (UNFCCC)

The UNFCCC sets up a classification scheme in which developed nations are divided into two categories – those in Annexes I and II. Developing nations are considered separately. Annex I comprises the OECD nations[19] and the countries undergoing a transition to a market economy, primarily countries that belonged to the former Soviet Union bloc. Annex II comprises the OECD nations. All other nations are considered developing countries.

Annex I and Annex II states have different legal obligations under the UNFCCC. Article III of the UNFCCC provides that "developed country parties should take the lead in combatting climate change and the adverse effects thereof." Developing countries, on the other hand, do not have any binding commitments. They only obligation they have is to recognize the need for sustainable development.[20] Although this approach is a practical application of the CBDR principle discussed in the previous chapter, this obligation to recognize the need for sustainable development is at best vague. Furthermore, as will be discussed shortly, the use of the CBDR principle is the major weakness of the Protocol.

In the spirit of cooperation, the UNFCCC set up a system of self-reporting by the

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19 The OECD nations essentially appear in both Appendices. The Annex I Parties are: Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, European Community, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, the Ukraine, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

20 UNFCCC, *supra* note 2 Article 10.

governments of parties. States send in information on their national GHG emissions and plans to combat climate change.[21] The UNFCCC also established a long-term procedure for addressing climate change.[22] Developed countries, in principle, agreed to promote the transfer of funding and technology to help developing countries respond to the threats of climate change.[23] However, the Convention did not specify any set global targets for emission reduction. It also did not state the modalities by which the developed countries will effect the agreed assistance to developing countries. This is because the UNFCCC was intended to be the foundation of the regime. To address the issue of vagueness, the INC met after the adoption of the Convention in six further sessions to discuss matters relating to obligations in and implementation of the Convention. At the first COP, the parties agreed that new commitments were needed for the post-2000 period.[24] An *Ad hoc* Group was established to draft a Protocol for adoption at the third COP of the UNFCCC in 1997.[25]

Developing nations advanced the CBDR principle after climate change first became an international issue as a way to support their position against binding commitments for developing countries. The developing nations as a group have consistently opposed mandatory current or future reductions. It appears though, that the door is not completely shut to the idea of future emission reduction obligations on the part of developing countries. The thrust of the argument by developing

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21 United Nations Framework Convention on Climate Change, *Review of the Implementation of Commitments and of other Provisions of the Convention. UNFCCC Guidelines on Reporting and Review*. FCC/CP/1999/7 (Geneva: United Nations, 2000),online: UNFCCC <http://unfccc.int/resource/docs/cop5/07.pdf> (date accessed: 12 March 2004).

22 UNFCCC, *supra* note 2 Article 4.2.

23 *Ibid.*, Article 4.4 and 4.5.

24 Chiara Giorgetti, "From Rio to Kyoto: A Study of the Involvement of Non-Governmental Organizations in the Negotiations on Climate Change (1999) 7 N.Y.U. Envtl. L.J. 201 at 207.

25 T. Hunt, "People or Power: A Comparison of Realist and Social Constructivist Approaches to Climate Change Remediation Negotiations "(2001) 6 UCLA J. Int'l L. & Foreign Aff. 270.

countries seemed to be that they should not have to sacrifice their development goals to address the issue of climate change that they perceive as a problem caused in the development process of the North.[26] In a nutshell, while the argument of the developing nations is not completely against taking responsibility for their GHG emissions, their argument is that developing states should not have to take on binding limits. Many developing nations are presently taking measures to reduce emissions. Eighty-three non-Annex I parties have either ratified or acceded to the Protocol.[27] However, they are unwilling to take on binding limits because of the fear that limits might harm their development. Thus, at the Rio Summit, the developing nations showed that they had a common goal – that any climate change treaty produced would not impose emission-reduction commitments on developing nations.[28]

It is ironical that the different sub-blocs within the developing nations' bloc had different reasons for adopting this unified position. Within the bloc representing the developing countries, there is sub-bloc representing the Organization of Petroleum Exporting Countries (OPEC), another representing the Alliance of Small Island States (AOSIS) and then there was the sub-bloc that can be called "the rest of the developing countries" sub-bloc.

The members of the oil exporting community were set against commitments for developing countries to reduce GHG emissions.[29] This was understandably predicated on their interest in exporting oil and natural gas, the major source of their foreign earnings.[30] Within the

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26 Oberthur & Ott, *supra* note 6 at 27.

27 Kyoto Protocol Thermometer, online: UNFCCC <http://unfccc.int/resource/kpthermo.html> (date accessed: 12 March 2004).

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

developing country sub-blocs, the small island states were the most concerned about the environmental impact of climate change as they were the closest to the sea level.[31] However, because some of the AOSIS states also produce fossil fuels, the economic considerations could not be divorced from their worries on climate change. Therefore, AOSIS states had conflicting interests on the issue, but aligned their stance with that of the rest of the developing countries.

The developing countries' attitude was also based on a shared concern for equity.[32] They expressed concern for the risk of sacrificing (or at the very least, minimizing) their desire for accelerated economic and social development in order to solve what they perceived to be a problem that was caused by the developed countries.[33] Even if they were willing, the provisions of the Protocol will only come into force once 55 parties to the Convention ratify (or approve, accept, or accede to) the Protocol, including Annex I Parties accounting for 55% of that group's (i.e., Annex I's) carbon dioxide emissions in 1990.[34]

Among the developed countries, there were also different sub-blocs with different reasons for the clamour for worldwide GHG reductions. One view was that of the European Union (EU), a large importer of fossil fuels. The EU's interest in the debate stemmed from its interest in reducing its energy bills.[35] Annexed to this reason, is the fact that the Union has significant shares of the global market in the more recent renewable energy and energy-efficient technology.[36] Therefore, the interests of the EU also lie in the worldwide reduction of GHG emissions as means

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31 An example of such a country is Seychelles.

32 Oberthur & Ott, *supra* note 6 at 27.

33 *Ibid.*

34 Article 25 of the Protocol, *supra* note 1.

35 Oberthur & Ott, *supra* note 6 at 15.

36 *Ibid.*

of promoting renewable energy. Further concerns of the EU are the present and possible environmental impacts of climate change on Europe.[37]

JUSSCANZ is an acronym for the sub-bloc of Japan, the United States, Switzerland, Canada, Australia, Norway and New Zealand.[38] Members of this sub-bloc approached the climate change issue from different angles, but they were united in their views on the refusal of a need for commitments for GHG emission reduction.[39] The U.S. is the largest emitter of GHGs and carbon dioxide, and was initially opposed to the stringent commitments for GHG emission reduction. The U.S. is also the world's largest producer of coal, oil and gas.[40] It also happens to be the most powerful member of the sub-bloc and its overall reservation is on the lack of corresponding GHG reduction commitment by developing countries.[41] The argument of developed nations is that "taking the lead" merely means allowing a lag time before developing nations are subject to the same commitments as developed nations, but requiring developing nations to take on some weaker commitments at the same time.

After the U.S., Japan is the second largest GHG emitter within the sub-bloc.[42] Japan, unlike the U.S., has no fossil fuel reserves and thus depends on fossil fuel imports, especially oil. Japan's interests therefore lie in reducing its oil imports. For reasons similar to those of the U.S., Japan is interested in the resulting market from set GHG emissions reduction, i.e., its energy-

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37 *Ibid.*

38 Giorgetti, *supra* note 24 at 209. The sub-bloc sometimes included Iceland and South Korea.

39 *Ibid.*

40 *Ibid.* See also Oberthur & Ott, *supra* note 6 at 18.

41 *Ibid.* at 228-230.

42 *Ibid.* at 20.

efficient technology market which it stands to benefit from if the Kyoto Protocol is implemented.[43] It appears that, for tactical economic and political reasons, Japan is hesitant to align itself with a position that clearly opposes that taken by the United States.

3.2.2 The Kyoto Protocol

The "*raison d' être*" of the Kyoto Protocol can be traced to the fact that the UNFCCC was intended only to be a foundation for the climate change regime and the addition of a protocol to the Convention was always the intention.[44] The clear intent of the Convention, as expressed by the parties, was primarily to ensure that states consider the possible impact of greenhouse gas emissions when implementing domestic policy. The particulars for the realisation of the objectives of the Convention were left out in drafting the Convention.

The Kyoto Protocol is a tool for the implementation and enforcement of concrete goals in accordance with the objectives of the UNFCCC. The major features of the Protocol are: the reduction timetables of the developed countries; the acknowledgements of the role of GHG sinks (seas and forests); the possible creation of "bubbles" and trading emissions; joint implementation of the agreement by willing countries and the novel aspect of joint projects with developing countries under the Clean Development Mechanism.[45]

The Kyoto Protocol was adopted at the third session of the Conference of the Parties

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43 Sebastian Oberthur & Herman Ott, "UN/Convention on Climate Change: The First Conference of the Parties", (1995) 25 Envtl. Pol'y & L. 144 at 145.

44 United Nations Framework Convention on Climate Change, *Understanding Climate Change: A Beginner's Guide to the UN framework Convention*, (Switzerland: UNEP/WMO Information Unit on Climate Change, 1994) at 17.

45 For more on the history of the CDM, see Oberthur & Ott, *supra* note 6 at 165-169.

(COP-3) of the UNFCCC in Kyoto, Japan in November 1997 (COP-3). It called for industrialized nations, i.e., Annex I parties of the Protocol, to reduce their average national GHG emissions.[46] These reductions cover six greenhouse gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons

(HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF6).

The Kyoto Protocol requires thirty-eight developed nations to reduce their GHGs by an average of 5.2 % below 1990 levels between 2008 and 2012.[47] Japan made a commitment to reduce its emissions by 6 %. The United States, on its own part, promised a 7% reduction, and the European Union (EU) made a commitment to reduce its emissions by 8%.[48] Countries with Economies in Transition (CEITs),[49] i.e., countries that can be said to have medium sized economies, are projected to stabilize their GHG emissions and the incentive is that they will benefit from technology transfers from developed countries in order to aid in stabilization.[50] It is intended that differences in actual and assigned emission amounts will be carried over at the request of the party concerned to the second (2013-2017), third (2018 -2022) and subsequent commitment periods.[51] This arrangement leaves room for one potential problem and that is, developing nations' production

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46 M. Toman, "Strategies for Responding to the Kyoto Protocol", March 1998, online: Weathervane <http: //www.weathervane.rff.org/refdocs/toman_italy.pdf> (date accessed: 18 April 2003).

47 Kyoto Protocol, *supra* note 1, Article 3.1.

48 J.H. Searles, "Analysis of the Kyoto Protocol to the U.N. Framework Convention on Climate Change" (1998) Int'l. Env't.. Rep.131 at 134.

49 The Economies in Transition include Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, and the Ukraine The CEITs made reduction commitments – Bulgaria, Czech Republic, Slovakia, Estonia, Latvia, Lithuania, Romania and Slovenia made emission reduction commitments for 8% for; Hungary and Poland for 6%; and Croatia made commitments for a 5% emission reduction. See Climate Change Knowledge Network <http://www.cckn.net/compendium/economies.asp> (date accessed: 12 March 2004).

50 Oberthur & Ott, *supra* note 6 at 23.

51 See Kyoto Protocol, *supra* note 1, Article 3.13.

of GHGs is expected to outpace developed nations' production by 2020, so any long-term solution must include developing nations.[52] The alternative outcome is that the developed nations will undertake to reduce even further their assigned emission levels during the commitment periods to levels that are even lower than prescribed in the Kyoto Protocol so that the emission levels can even out.

The application of the CBDR principle in the climate change regime has elicited debate and academic commentary.[53] Due to the lack of binding obligations on developing countries, opposition in the U.S. Senate, which must ratify the treaty by a two-thirds majority before it enters into force in the country,[54] was loud and widespread.[55] A majority of U.S. senators oppose the Kyoto Protocol because of the developing countries lack of emission reduction obligations.[56] The U.S. Senate on 12 June 1997, adopted a non binding resolution, making it clear that it would not grant its advice and consent for any agreement resulting from the Kyoto Protocol which excluded binding obligations by developing countries.[57] The U.S. Administration, therefore, decided to delay submission of the Kyoto Protocol to the Senate until after the scheduled 1998 fourth conference of the parties in Buenos Aires, during which meeting the U.S. government planned to apply pressure

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52 Shue, *supra* note 16 at 353.

53 See Richard A. Warrick & Atiq A. Rahman, "Future Sea Level Rise: Environmental and Socio-Political Considerations", in Irwin L. Mintzer, A. Kleiner & A. Leonard, eds., *Confronting Climate Change: Risks, Implications and Responses,*(Cambridge: Cambridge university Press, 1997) at 97; Michael Grubb *et al* " Sharing the Burden" in Mintzer, Kleiner & Leonard, eds., *supra* note 48 at 305.

54 The United States Constitution, Art. XI, 2, cl. 2.

55 F. J. Sensenbrenner, Congressional Press Release to the Fourth Conference of the Parties (COP-4) (Nov. 12, 1998) in Hunt, *supra* note 21 at 273.

56 Hunt, *supra* note 25 at 275.

57 Michael R. Molitor, "The United Nations Climate Change Agreement, in Norman J. Vig & Regina S. Axelrod, eds.,*The Global Environment: Institutions, Law and Policy* (Washington, D.C.: Congressional Quarterly, 1999) at 225.

on developing nations to accept binding limits on GHG emissions.[58] This did not happen. As at January 31, 2004, 106 parties including Canada have signed the Kyoto Protocol, accounting for 44.2 % of the total carbon dioxide emissions for 1990.[59] For the Kyoto Protocol to enter into force, fifty-five parties must ratify the treaty and of the fifty-five ratifying parties, there must be a sufficient number of Annex I parties to account for 55% of the Annex I emissions.[60] Ratification by the United States is important not only because of the GHG emissions by the U.S. that must eventually be reduced (U.S. emissions amount to about 36.1% of the total Annex I emissions),[61] but also because of the infectious effect a decision to ratify would likely have on other parties' decisions to ratify. For instance, Australia has indicated it will not ratify the Protocol unless the U.S. ratifies.[62] More recently, however, the Australian Senate referred its Kyoto Protocol Ratification Bill 2003 (No. 2) to the Senate Standing Committee on Environment, Communications, Information Technology and the Arts for inquiry and report by March 4, 2004.[63] It will be possible to bring the Protocol into force without the U.S. if the EU, Japan, Russia, and Australia ratify the treaty. However, the likelihood of that is very faint.

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58 G. C. Bryner, "Implementing Global Environmental Agreements in the Developing World" (1997) Y.B. Colo. J. Int'l Envtl. L. & Pol'y 1 at 7.

59 Online: UNFCCC <http://unfccc.int/resource/kpthermo.html> (date accessed : 12 March 2004). Canada ratified the Protocol on 10 December 2002.

60 Kyoto Protocol *supra* note 1 Article 25.

61 Online: UNFCCC <http://unfccc.int/resource/kpthermo_if.html> (date accessed: 25 March 2004).

62 Greenpeace, "Four Nations Seeking to Spoil Climate Talks", online: Greenpeace <http://archive.greenpeace.org/pressreleases/climate/2001nov1.html> (date accessed: 12 March 2004).

63 Hunt, *supra* note 25 at 276. See also, online: <http://www.aph.gov.au/Senate/committee/ecita_ctte/kyoto/index.htm> (date accessed: 12 March 2004)

3.3 The Mechanisms of the Kyoto Protocol

It was clear to almost all the parties after UNFCCC COP-2 that, in contrast to the soft-law approach taken by the Convention which had "proven to be inadequate,"[64] the Protocol had to adopt a more binding approach with the aid of enforceable obligations. President Clinton was quoted as saying on October 22, 1997, that "The industrialized nations tried to reduce emissions to 1990 levels once before with a voluntary approach, but regrettably most of us – including especially the United States – fell short."[65]

Obligations are contained in Article 3.7 and Annex B of the Protocol.[66] To meet these targets, the Protocol makes provisions for three major mechanisms to address the overall objectives of the Protocol and the economic concerns of parties from the North and the South. The mechanisms in the Protocol are incentives for compliance. What is more important, they are avenues for partnership between parties. These mechanisms are: (a) emissions trading – found in Article 17(b); joint implementation – found in Article 6; and (c) the Clean Development Mechanism (CDM) – found in Article 12.

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64 Oberthur & Ott, *supra* note 6 at 123.

65 See The White House, Office of the Press Secretary, National Geographic Society, Washington, D.C., "Remarks by the President on Global Warming and Climate Change,"Online: United Eco-Action Fund <http://uneco.org/Global_Warming.htm l#Remarks%20by%20the%20President%20on%20Glo>(date accessed: 25 March 2004).

66 Annex B contains the 39 emissions-capped industrialized countries and economies in transition. Legally-binding emission reduction obligations for Annex B countries range from an 8% decrease to a 10% increase on 1990 levels by the first commitment period of the Protocol, 2008 - 2012. States in Annex B include Australia, Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, to mention but a few. See online: <http://www.aie.org.au/melb/material/resource/kyoto.htm> (date accessed: 12 March 2004). In practice, Annex I of the Convention and Annex B of the Kyoto Protocol are used almost interchangeably.

a. Emissions Trading

Emissions trading is the exchange between states of any excess GHG emissions after meeting their target Emission Reduction Units (REUS).[67] Emissions trading is perceived as an instrument to help states reach their emission reduction targets.[68] Article 17 of the Protocol allows Annex B countries who have emission reduction commitments to circulate among themselves emission amounts as long as the countries do not, overall, surpass their assigned amount of GHG emissions. Under this mechanism, developed countries that emit less than they are allowed under the Protocol can sell their excess allowances to the countries that find it hard to meet their targets. The assigned amount of REUS for each party must be adjusted accordingly when the units are transferred or acquired.[69] However, such transfers do not necessarily have to be directly linked to emission reductions from specific projects. Emissions trading between Annex B parties of the Protocol can be used to supplement domestic actions for fulfilling commitments.[70] The Protocol contains no details of the modalities for such because the COP is meant to draw up the rules meant to guide the particulars of the mechanism.

There was and still are some strong political reservations about this mechanism, especially from the developing countries and the EU.[71] The EU would like to clamp a tight lid on the extent to which acquisitions of REUS through emissions trading can satisfy compliance

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67 This is the technical term for the output of emissions trading and joint implementation projects, as defined by the Kyoto Protocol contrasted with certified emission reductions (CERs) - the technical term for the output of CDM projects, as defined by the Kyoto Protocol.

68 Article 17 of the Kyoto Protocol, *supra* note 1.

69 *Ibid.* Articles 3.10 and 3.11.

70 *Ibid.*

71 Oberthur & Ott, *supra* note 6 at 188.

obligations.[72] However, this mechanism, part of an emissions reduction strategy, is preferred by both industry and government over other known models. Emissions trading help states to maximise the developmental possibilities associated with GHG emissions while keeping their international obligations.[73]

The Protocol makes the following provisions for emissions trading :

1. In accordance with Articles 6 or 17, when any party acquires REUS from another party, such REUS or any part thereof will be added to the assigned amounts for the first party. In other words, the overall REUS that an acquiring party must seek not to exceed, will be a total of its original assigned emission limit, plus the additional amount acquired from the other party;[74]

2. Conversely, the party transferring its unused ERUs to another, will have the same amount subtracted from its original limit – also in accordance with Articles 6 or 17;[75]

   (I) The COP to the Convention will define the modalities and guidelines for emissions trading; and

   (II) Annex B parties, (i.e., the developed countries of the OECD and CEITS) may participate in emissions trading as a supplemental action to domestic actions for the purpose of fulfilling their obligations under Article 3.[76]

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72 Searles, *supra* note 48 at 133.

73 Andrew Bachelder, "Using Credit Trading to Reduce Greenhouse Gas Emissions" (1999) 9 J. Env. L. & Prac. 281 at 284.

74 Kyoto Protocol, *supra* note 1 Article 3.10.

75 *Ibid.* Article 3.11.

76 *Ibid.* Article 17.

However, because of the relatively uncertainty surrounding the Protocol, the only existing guidelines are those in the domestic legislation governing emissions trading. An efficient emission trading mechanism will need to consider the divergent provisions that currently exist in domestic law.[77]

Once again, the Kyoto Protocol exhibits options for global cooperation. Parties are encouraged to minimize their emission levels, not only to fulfil their obligations under the Convention and Protocol but, as a means to that, to be used as bargaining chips. Since this mechanism is designed for use between Annex I parties, it is likely that the trading envisaged would be carried out on a level playing field. The same may not, however, be said when the CDM is discussed.

The text on emissions trading is short and vague. The COP is to determine and define the relevant and particular rules guiding the mechanism. The Protocol particularly mentions "verification, reporting and accountability for emissions trading" as the focus of such rules.[78] Although a system of permits for carbon emissions has been contemplated for some time,[79] the country-by-country quotas for the permits have not been reduced to specific terms. Certain attendant issues, such as the pricing system and the form of the market, have also not been resolved. Will states be allowed to dictate their own prices or will the prices be the same across the board regardless of who is selling?[80] If emissions pricing is to be determined uniformly, who makes the decisions? These and other relevant questions have to be answered if the Kyoto Protocol comes into

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77 Michaell J.H. Smith & Thierry Chaumeil "Greenhouse Gas Emissions Trading Within the European Union: An Overview of the Proposed European Directive" (2002) 13 Fordham Envtl. Law J. 207 at 213.

78 *Ibid.* Article 17.

79 J. Werksman, "The Clean Development Mechanism: Unwrapping the "Kyoto Surprise" " in G. Chichilnisky & G. Heal, eds., *Environmental Markets: Equity and Efficiency* (New York: Columbia University Press, 2000) at 133.

80 *Ibid.*

force.[81]

If there was a theory of altruistic global cooperation on the issue of climate change, it becomes highly suspect, based on the position of the priority of this market-based mechanism above others for developed countries, specifically the United States. The adoption of the specific Protocol Article on emissions trading was near the top of the U.S.' list for Kyoto action.[82] It appears that the U.S. will be the principal beneficiary of this mechanism if it ratifies the Protocol. Ideally, this mechanism should be an incentive for the U.S.' ratification of the Protocol, since it is a legal means of keeping its emissions level at its current level, while fulfilling any emissions reduction obligation it undertakes.

b. Joint Implementation

Joint implementation allows Annex I parties to jointly fulfill their commitments in reducing GHG emissions. Such commitments will be considered satisfied when the combined gross emissions of the parties involved does not exceed the assigned amounts in Annex B.[83] Emission level allocations to each participating party must be set out in their agreement. The UNFCCC secretariat is to be notified as to the agreement terms and it will, in turn, inform the other parties.[84]

The concept behind this mechanism is the achievement of the objectives of the regime in an economically acceptable manner – to save on resources and to maximise emissions reduction. The term "joint implementation", though not used in the Kyoto Protocol, is commonly

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81 See however the discussion in chapter 3.4.

82 Searles, *supra* note 48 at 133.

83 Kyoto Protocol, *supra* note 1 Article 4.

84 *Ibid.*

used to refer to Article 6. Joint implementation under Article 6 and the CDM under Article 12 of the Protocol are different: the former deals with projects undertaken jointly by Annex I parties and the latter involves Annex I and non-Annex I parties.[85]

The provisions of Article 6 state that:

1. Jointly implemented projects must be approved by participating parties;[86]
2. Jointly implemented projects have to provide additional emissions reduction, i.e., in addition to any other reduction that might otherwise occur independent of the proposed project. The project must do so by dealing with the emissions sources or providing what the Protocol terms "enhancement of removal by sinks";[87]
3. Article 6 is also contingent upon parties' compliance with their obligations under Articles 5 and 7 of the Protocol, which deals with the domestic systems that parties must put into place for emission reduction goals;[88] and
4. ERUs will be acquired not as the sole means to meeting obligations under the regime, but as "supplemental to domestic actions for the purpose of meeting the quantified targets under Article 3."[89]

Like the emissions trading mechanism, the details on the joint implementation mechanism still need to be sorted out. The EU also wanted specific limits to the use of the mechanism to meet reduction commitments, but the "supplemental" role of the joint implementation

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85 J. T. Bryce, "Current Issues in Agricultural Law: Controlling the Temperature: An Analysis of The Kyoto Protocol"(1999) 62 Sask. L. Rev. 379 at 392.

86 Kyoto Protocol, *supra* note 1 Article 6.1 (a).

87 *Ibid.* Article 6.1 (b).Under the Convention, a "sink" is any process, activity or mechanism that removes GHGs from the atmosphere. See Article 1.8 of the UNFCCC.

88 *Ibid.* Article 6.1 (c).

89 *Ibid.* Article 6.1 (d).

mechanism was all that was agreed on at the negotiations.[90]

Although all three mechanisms are important, the most relevant to the discussion in this thesis is the CDM.

c. The Clean Development Mechanism (CDM)

The CDM encourages the joint undertaking of projects between Annex I and non-Annex I parties with supposed advantages accruing to both parties. The CDM reveals the spirit of CBDR behind the Protocol. It also reveals the divergent purposes and objectives of the North and South on the issue of climate change. Developed countries were determined to avoid the creation of a new financial institution as they wanted to concentrate North-South financial transfers in the Global Environment Facility (GEF).[91] Developing countries, in contrast, wanted a break from the GEF as they had been dissatisfied with its administration from its inception.[92] They hoped to gain more influence in a new institution, which they felt was lacking in the GEF.

There is no precise definition of the Mechanism. Article 12.1 of the Kyoto Protocol blandly states that "[A] Clean Development Mechanism is hereby defined." For a definition of the CDM, we may have to look to the definition of the purpose of the Mechanism in Article 12.2, which

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90 *Ibid.* See further to this, the discussion in chapter 3.4.

91 The GEF is the tripartite cooperative arrangement for the implementation of the global environmental initiative in the World Bank; the arrangement being between the World Bank, the United Nations Development Programme (UNDP), and the United Nations Environmental Programme (UNEP) (with the World Bank as a development institution). The rationale for the GEF is to provide financial support for activities that promote protection of the environment – but only for activities in developing countries. For further information, see the GEF website. Online: GEF <http://www.gefweb.org/> (date accessed: 6 April 2004).

92 See for example, Uganda's stance on this in Richard Campbell et al., eds, Summary of the Fourth Meeting of the Conference of the Parties to the Convention on Biological Diversity, online: International Institute for Sustainable Development <http://www.iisd.ca/download/asc/enb0996e.txthttp://www.iisd.ca/download/asc/enb0996e.txt> (date accessed: 14 March 2004).

is:

> ...to assist parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.

Article 12.3 provides that:

> Under the Clean Development Mechanism:
>
> (a) Parties not included in Annex I will benefit from project activities resulting in certified emission reductions; and
> (b) Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

Neither Article 12.1 nor Article 12.2 is enlightening on the precise definition of the CDM.

The objective of the CDM, on the one hand, is to assist developing countries in achieving sustainable development and indirectly to contribute to the overall objectives of the Convention and, on the other hand, to assist developed countries in achieving compliance with their quantified emission limitation and reduction commitments.[93] Article 12.2 and 12.3 reveals some of the vagueness of the role developing countries are to play under the Kyoto Protocol. The benefits to Annex I parties are outlined in fair detail, while developed countries will merely "benefit from project activities" without any specific provision as to what the benefits will be. The only reference

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[93] Kyoto Protocol, *supra* note 1 Article 12 (2) and (3).

that may be alluded to is in Article 3.12. Article 3.12 of the Protocol makes a similar provision to those under the other two mechanisms, i.e., that any party acquiring ERUs will have the said ERUs added to their original limit, but unlike under the joint implementation and the emissions trading mechanism, the Protocol is silent on the converse subtraction of Certified Emission Reductions (CERs) from the transferring party under the CDM.

This is not the only result of the vague provisions of the Protocol. In negotiating the text of the Kyoto Protocol, there were many compromises and the result was that there was scarcely any guidance as to what the particulars of the CDM would be. The COP/MOP, i.e., the Conference of the Parties serving as the Meeting of the Parties, which is the supreme body of the Protocol, was not properly outlined. There is a need to develop modalities and other criteria for the daily operation of the CDM. Article 13.4 merely states that the COP/MOP among its other duties, "...shall make, within its mandate, the decisions necessary to promote its effective implementation."

Key issues under negotiation on the Kyoto Protocol mechanisms have included: the question of "supplementarity" (whether a limit should be placed on the use of the mechanisms); which projects should be eligible for the CDM (particularly whether sink projects and nuclear energy projects should be permitted); whether the share of proceeds including an adaptation levy applied to the CDM should be extended to all three mechanisms; who should be liable if a party that has transferred a part of its assigned amount under emissions trading is not complying with its target; and the nature of the membership of the CDM Executive Board. Some of these issues were addressed at the COPs in Bonn in July 2001 and later at Marrakesh in November of the same year.

3.4 The Clean Development Mechanism, Bonn and Marrakesh: Any Progress?

In November 1998, the UNFCCC parties met in Buenos Aires at COP-4 and, *inter alia*, agreed to elaborate the guidelines and modalities of the three mechanisms, with priority to be given to the CDM. Decisions were to be taken on these guidelines in November 2000 at COP-6 scheduled for The Hague. These included decisions to be recommended for adoption at the COP/MOP 1. At COP-6, however, the parties failed to reach agreement on a package of decisions under the Buenos Aires Plan of Action. The negotiating texts on the mechanisms, together with texts on other issues, were further postponed to a resumed session of COP-6 for further negotiation.

At the COP-6, Part II at Bonn in July 2001 parties adopted[94] the Bonn Agreements on the Implementation of the Buenos Aires Plan of Action,[95] registering political agreement on key issues, including the Kyoto Protocol mechanisms. However, because parties did not complete their work on detailed decisions on the mechanisms based on the Bonn Agreements, the draft texts were therefore referred to COP-7 scheduled for Marrakesh in October/November 2001 for further consideration.

Among other provisions, the Bonn Agreements specify that the use of the mechanisms will be supplemental to domestic action, and that domestic action will constitute a significant element of the effort made by each Annex I party in meeting its emission commitments

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94 FCCP/CP/2001/L.7, Decison 5/CP.6. online: UNFCCC <http://maindb.unfccc.int/library/?screen=list&FLD0=dC&OPR0=contains&VAL0=FCCC/CP/2001/L.7> (date accessed: 14 March 2004).

95 Decision 1/CP.6. online <http://unfccc.int/resource/docs/cop6/dec1-cp6.pdf>. More details on UNFCCC meetings and decisions at <http://maindb.unfccc.int/library/> (date accessed: 14 March 2004).

under the Protocol.[96] Annex I parties are to provide information concerning this provision, which will be considered by the facilitative branch of the Compliance Committee if questions of implementation are raised. According to the Bonn Agreements, the eligibility of a party to participate in the mechanisms is dependent on compliance with methodological and reporting requirements under the Protocol and acceptance of the Protocol's compliance regime.

Concerning CDM projects, the Bonn Agreements state that the CDM Executive Board will develop and recommend to the COP-8[97] simplified modalities and procedures for small-scale projects, including renewable energy and energy efficiency projects. Afforestation and reforestation will be the only eligible land-use, land-use change and forestry projects under the CDM in the first commitment period, and the Subsidiary Body for Scientific and Technological Advice (SBSTA) will further develop modalities and procedures for addressing such concerns as nonpermanence, "leakage effects" [98] and socioeconomic and environmental impacts.[99]

The "adaptation levy"[100] will amount to 2% of the certified emission reductions issued for a CDM project activity. The CDM Executive Board comprises ten parties to the Kyoto Protocol, including one from each of the five UN regional groups, i.e., Europe, Asia, Americas, Africa and Australia, and two other members from Annex I parties, two from non-Annex I parties,

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96 The informal note by the president of the Conference of the Parties of the UNFCCC annexed to Decision 1/CP.6.

97 In October/November 2002. Additional information is on the UNFCCC website. Online: UNFCCC<www.unfccc.org> (date accessed: 14 March 2004).

98 Oberthur & Ott, *supra* note 6 at 152 (i.e.," the reallocation of emission-intensive activities to other sites").

99 *Ibid.*

100 The adaptation levy was to go toward climate change mitigation and adaptation in developing countries. See Oberthur & Ott, *supra* note 6 at 166.

and one representative of the small island developing states.[101]

The CDM is designed to be supervised by an Executive Board and on November 10, 2001, members of the Executive Board were elected by acclamation.[102] The Executive Board of the CDM met on April 9-10, 2002 in Bonn. It proposed to discuss a work plan until the COP-8.[103] The issues that went onto the work plan included the accreditation process for operational entities, and simplified modalities and procedures for small scale CDM project activities.[104] Also, a panel was planned to be launched at the third meeting to develop recommendations to the Board on simplified modalities and procedures. The Board met in Bonn on June 9-10, 2002 and it agreed to launch the accreditation process.[105] The Board at its last meeting, its twelfth, on November 27-28, 2003 in Milan, Italy considered several baselines and monitoring methodologies, but have not addressed the issues of transfer of technology.[106] The Board will meet on March 24-26, 2004, in Bonn, Germany, but the proposed agenda[107] reveals that its decisions will be similar to that of its twelfth meeting. It is hoped that, between the panels of the Executive Board and the SBSTA, the issue of transfer of technology under the CDM will be addressed someday soon.

The UNFCCC Conference of Parties at its seventh session in Marrakesh drew up the

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101 The list of the Members of the Executive Board as listed in FCCC/CP/2001/13/Add.4. Section V., Online: UNFCCC <http://unfccc.int/cdm/members.html> (date accessed: 14 March 2004).

102 Report of the Conference of the Parties on its Seventh Session, held at Marrakesh From 29 October to 10 November 2001. Paragraph 106, Online: UNFCCC <http://unfccc.int/resource/docs/cop7/13.pdf> (date accessed: 16 April 2003).

103 Online: UNFCCC <http://cdm.unfccc.int/EB/rules/modproced.html#CEB> (date accessed: 14 March 2004).

104 *Ibid.*

105 *Ibid.*

106 See online: UNFCCC <http://cdm.unfccc.int/EB/Meetings/012/eb12rep.pdf> (date accessed: 14 March 2004).

107 See online: UNFCCC <http://cdm.unfccc.int/EB/Meetings/013/eb13propag.pdf> (date accessed: 12 March 2004).

draft modalities and procedures for the CDM[108] which is proposed for adoption at the first COP/MOP of the Kyoto Protocol when it enters into force. On the issue of whether a limit should be placed on the use of the mechanisms under the Protocol to achieve emission reductions, the draft decision of the COP in the case of the CDM was that:

> Affirming that the use of the mechanisms shall be supplemental to domestic action and that domestic action shall thus constitute a significant element of the effort made by each party included in Annex I to meet its quantified emission limitation and reduction commitments under Article 3, paragraph 1.[109]

On the issue of land use:

> 7 ...(a) that the eligibility of land use, land use change and forestry project activities under the clean development mechanism is limited to afforestation and reforestation;
> (b) that for the first commitment period, the total of additions to a party's assigned amount resulting from eligible land use, land use change and forestry project activities under the Clean Development Mechanism shall not exceed 1% of base year emissions of that party, times five;
> (c) that the treatment of land-use change and forestry project activities under the Clean Development Mechanism in future commitment periods shall be decided as part of the negotiations on the second commitment period.[110]

The Bonn Agreements further stipulate that Annex I parties are to refrain from using credits from "joint implementation" under Article 6 or the CDM that are generated from nuclear

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108 Draft Decision 17/CP.7 online: UNFCCC <http://unfccc.int/cdm/cop.html> (date accessed: 12 May 2003).

109 *Ibid.*

110 *Ibid.*

facilities.[111] Consonant with this stipulation, on the issue of which projects should be eligible for the CDM (particularly whether sink projects and nuclear energy projects should be permitted), the draft decision of the COP confirms the objective of the Protocol. It provides that:

> Recognizing that parties included in Annex I are to refrain from using certified emission reductions generated from nuclear facilities to meet their commitments under Article 3, paragraph 1.[112]

The exclusion of nuclear energy projects might be "due to the inherent dangers concerning operation and disposal of nuclear wastes (especially in developing countries)."[113] There are inherent dangers concerning operation and disposal of nuclear wastes and if allowed under this Mechanism it will neutralize the major objectives of the Climate Change Convention.

The following are the achievements made at Marrakesh on the CDM:

(a) New provisions were adopted for public participation in the Clean Development Mechanism that will help the public monitor and have input into proposed CDM projects;[114] and

(b) Enforceable rules were made that ensure that countries must adhere to a set of rules on reporting, monitoring and verification of emissions before being able to use the Kyoto mechanisms.[115]

Article 12.9 allows for the participation of "private and/or public entities". Several issues arise from this. The nonparty status of private entities makes for lack of clarity on the issues

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111 UNFCCC. online: UNFCCC <http://unfccc.int/cop7/issues/mechanisms.html> (date accessed: 14 March 2004).

112 *Ibid.*

113 Oberthur & Ott, *supra* note 6 at 178.

114 Decision 17/CP.7, online: UNFCCC <http://unfccc.int/cdm/cop.html> (date accessed: 23 May 2003).

115 *Ibid.*

of liability for project failure (i.e., who bears the liability if a project undertaken with a non-subject of international law fails?) and the possibility of acquisition and sale of CERs.[116] There is also the vagueness of the rules that will govern liability and dispute settlement.

In December 2003, the COP-9 released and later adopted its advance unedited version Decision -/CP. 9 on modalities and procedures for afforestation and reforestation project activities under the CDM. The COP

> ...3. *Decides* that the treatment of land use, land-use change and forestry project activities under the clean development mechanism in future commitment periods shall be decided as part of the negotiations on the second commitment period and that any revision of the decision shall not affect afforestation and reforestation project activities under the clean development mechanism registered prior the end of the first commitment period;
> 4. *Decides* to periodically review the modalities and procedures for afforestation and reforestation project activities under the clean development mechanism, and that the first review shall be carried out no later than one year before the end of the first commitment period, based on recommendations by the Executive Board of the clean development mechanism and by the Subsidiary Body for Implementation, drawing on technical advice from the Subsidiary Body for Scientific and Technological Advice, as needed for afforestation and reforestation project activities under the clean development mechanism.[117]

The next COP (COP-10) is scheduled for November 29, 2004 to December 10, 2004 in Buenos Aires, Argentina.

There is an acknowledgment of the role of non-state actors in international affairs.[118]

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116 CERs are emission reduction credits acquired by a country when it is involved in a project that causes emissions to be lower than it would otherwise have been. These units are certified by the Executive Board of the CDM.

117 Online: UNFCCC <http://unfccc.int/cop9/latest/sbsta_l27.pdf> (date accessed: 14 March 2004).

118 See for example, Stephen Toulmin, "The UN and Japan in an Age of Globalization: The Role of Transnational NGOs in Global Affairs" online: Global Development Research Centre <http://www.gdrc.org/ngo/toulmin/st-main.html> (date accessed: 14 March 2004).

The vital role that non-state actors play in international legal relations cannot be ignored. Currently, non-state actors attend COPs as observers and there are channels for airing their concerns. The CDM has to be structured in a way that will revolutionize the status of non-state actors, not necessarily to make them subjects of international law, but to recognize their importance. For instance, the success of Environmental Non-Governmental Organizations (ENGOs) and developing nations in advancing the CBDR principle is a large factor in explaining the lack of specific binding commitments for developing nations other than the general commitments in Article 10.[119] On the other hand, non-state actors should be made responsible, in their own right, for their actions, thereby removing the loophole that presently exists in this regard.

3.5 Conclusions

From the preceding discussion, one major point is visible and that is that the developed countries, although willing to take the responsibility for their historical contribution to GHG emissions, are not willing to put their efforts into the Kyoto Protocol as they perceive that the lack of limits on the GHG emissions of developing countries may diminish the effect of their own efforts.

What is the success range of the climate change regime at harmonizing the interests of the North and the South in the light of the different perspectives from which the two view the problem of climate change? We must again examine this against the background of the CBDR principle.

The U.S. Senate reacted negatively to the idea of the developed nations bearing the

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[119] Giorgetti, *supra* note 24 at 22 -28.

burden of combatting climate change alone, even temporarily.[120] It unanimously passed a resolution aimed at ensuring that the United States and other developed countries would not sign a climate change agreement unless such an agreement imposes on developing countries at least some commitment to reduce GHG emissions.[121]

As a result, the U.S. has not ratified the Kyoto Protocol, and it has still not come into effect because of the lack of support from the US and other developed nations.[122] If the United States alone were to ratify the Protocol, the total emissions accounted for would be 80.3%.[123]

During his term, President Bill Clinton pushed for slightly different goals than those of the U.S. Senate, stating that his administration would not "assume binding obligations unless key developing nations meaningfully participate in this effort."[124] No further elaborations of what "meaningfully participate" meant was offered. Since the Kyoto Protocol did not provide for reductions in developing nations' emissions, there is a stalemate. The only commitments of the developing countries are couched within the general commitments of all parties in Article 10. Article 10 contains provisions on, *inter alia,* formulation, implementation, publication and update of national programs to mitigate GHG emissions. In contrast, another international agreement, the Montreal Protocol designed to combat ozone depletion, has provided for a delay in implementation

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120 See earlier discussion in this chapter.

121 See Molitor, *supra* note 57.

122 The developed nations and the percentage of their emission are: The United States (36.1%), Russian Federation (17.4%), Canada (3.3%), Poland (3.0%), Australia (2.1%), Bulgaria (0.6%), Hungary (0.5%), and Switzerland (0.3%).

123 Kyoto Protocol Thermometer. Online: UNFCCC <http://unfccc.int/resource/kpthermo_if.html> (date accessed: 12 March 2004).

124 Original Senate Joint Resolution File No. 0005 Enrolled Joint Resolution No. 1, Senate Fifty-Fifth Legislature of the State of Wyoming 1999 Session, online: The Legislature of the State of Wyoming <http:// legisweb.state.wy.us/99sessin/ enroll/senate/sejr0001.htm> (date accessed: 23 May 2003).

by developing nations of binding emission reduction obligations,[125] whereas the Kyoto Protocol places no such obligations on developing nations at all.

After President Bush's speech on the United States' repudiation of the Kyoto Protocol on March 27, 2001,[126] the instinctive global response was outrage and strong condemnation. Governments, ENGOs and individuals all castigated the perceived *volte-face* of the U.S. There have been justifications for the U.S.' action, but this has been a minority view. These justifications include the concern that the Protocol relies on short-term emission reduction targets for 34 industrialised countries and no targets for the 154 other nations.[127] This is probably more worrying in the light of the belief that countries such as India and China that have no current targets are in the process of overtaking the known GHG emitters.[128] Another justification for the position of the U.S. is that the Kyoto Protocol paved the way for many governments to make ambitious promises they could not deliver on. [129]

There is a possibility that, in the future, there may be two approaches to the issue of global warming – the Kyoto system and the U.S. policy model.[130] That, in itself, is a threat to any chance of success for the present regime. The U.S. "alternative", if it ever appears, is very likely to

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125 *The Montreal Protocol on Substances that Deplete the Ozone Layer*, (1987) 26 I.L.M. 154; online: UNEP <http://www.unep.ch/ozone/treaties.shtml> (date accessed: 14 March 2004).

126 See for instance the view of Europeans in "Europe Disgusted by Bush's Renunciation of Kyoto Protocol" in *Asheville Global Report* (5-11 April 2001. online: Asheville Global Report <http://www.agrnews.org /issues / 116/> (date accessed: 19 November 2003).

127 R.N. Stavins, *"President Bush''s Withdrawal from the Kyoto Protocol Provides Opportunity for Meaningful Action"*. Policy Matters 01-11. April 2001.*Boston Globe* on April 4, 2001, online:AEI-Brookings Joint Center for Regulatory Studies <http://www.aei. brookings .org/publications/policy/policy_01_11.asp> (date accessed: 5 December 2003).

128 *Ibid.*

129 *Ibid.*

130 D. Kemp, "US Deal Does Not Rule Out Kyoto Signature" The Canberra Times of Australia.7. Online: Canberra Times <http://canberra.yourguide.com.au/detail.asp?class =features&subclass= science&category=feature &stared=137701&y=2002&m=3 l> (date accessed: 5 December 2003).

be strong on rhetoric, but very weak on targets and timetables for reducing greenhouse gas emissions.[131] It may try to postpone the hard choices to a time in the future when they will no doubt be much harder and more expensive to make and, perhaps, to a time when it is too late to reverse the damage that is being done to the world's climate system.[132]

There have been suggestions on how the Protocol can enter into force without U.S. ratification. However, leaving aside the lack of scientific proof that the Protocol will have a long-term influence on the reduction of the effects of GHG emissions, the issue is, without the U.S. ratification of the Protocol how effective will the treaty be with the major GHG emitter shut out of any attempt at addressing the climate change problem?

There is also the issue of the underlying presence of the actions of major multinational companies, whose interests will be jeopardized by developed states' ratification of the Kyoto Protocol especially by the United States. The so-called Fortune 100 companies stand to make a fortune if the Kyoto Protocol is not ratified by the United States.[133] There are other culprits: one source of GHG emissions that needs to be addressed quickly is the export of old technology-based refrigerants in refrigerators, car and home airconditioners and freezers.[134] Rather than dispose of these in an environmentally friendly manner, individuals and companies from the North ship them off to developing countries.[135] The South, steeped in poverty and without the technological resources, is usually grateful to have them.

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131 *Ibid.*

132 "Bush V. Climate", online: Greenpeace <http://archive.greenpeace.org/climate/climatecountdown/documents/clicantwait.pdf> (date accessed: 14 March 2004).

133 *Ibid.*

134 Most cars and refrigerators, especially the used ones, that are exported to developing countries still use the old environmentally-unfriendly technology.

135 The writer has personal experience of the tons of such refrigerants in Nigeria, Africa.

The actions of companies such as those mentioned above have to be preempted by the regime for climate change, because even if the United States decides to ratify the Protocol, there is not much to stop these companies from twisting the arm of host governments in developing countries and carrying out actions that are inimical to the Convention and Protocol. The issue that was earlier raised on liability for project failure is especially relevant – given that the participants in CDM projects can be private or public entities who are not subjects of international law. There are two possible solutions to address this issue. First, domestic legislation will have to be redesigned with these entities in mind. Second, it has been suggested that environmental contracts be drawn up with multinational enterprises.[136]

The questions surrounding the issue of climate change and addressing the problems associated with it can be narrowed to two alternatives: (1) Can the South be asked to settle for levels of emissions per capita far below those of the current levels of the North, which the North has produced as a consequence of its development? or (2) Should the North, on the other hand, be asked to bear the burden in its entirety by emitting lower levels of greenhouse gases?

It is obvious that while the global total of GHG emissions must stop growing, GHG emissions generated by the impoverished masses of the planet must grow if these individuals are to rise above the poverty in which generations have been trapped. What then is the solution to the impasse?

For the efforts to solve climate change problems to yield results, attitudes have to change both in the North and the South. The North has to be more willing in words and in deeds to

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136 See Nancy Lindborg, "Nongovernmental Organizations: Their Past, Present, and Future Role in International Environmental Negotiations" in Lawrence E. Susskind, Eric Jay Dolin & J. William Breslin, eds., *International Environmental Treaty Making* (Cambridge: The Program on Negotiation at Harvard Law School, 1992) 1-25.

commit to assistance by way of transfer of technology and funding the mechanisms of the climate change regime, especially the CDM. Before now, the North has been willing to commit to such assistance in words only. Concrete action by the North is the only way of ensuring that the South's striving for development is sustainable for all. For its own part, the South has to be willing to forgo the attitude of being owed favors and must make voluntary commitments to reduce GHG emissions as soon as possible and as much as possible without harming development potentials.

The CDM is a laudable instrument for uniting the North and the South, to deal with the issue of climate change while maximizing the benefits to both parties. However, all the rhetoric will not achieve anything if all the parties are not willing to compromise, a compromise based on the history of climate change but not chained to it. China and India are taking a cautious approach to issue of Activities Implemented Jointly (AIJ) and, unlike other developing states, are not exactly warm to the idea of the CDM.[137] The present state of climate change politics jeopardizes the proposed takeoff of the CDM since it is designed to operate under the Protocol as one of the mechanisms for addressing the issue of GHG emissions.

The rich countries must reduce their GHG emissions in order for the global total to remain constant, if the poorest billion are to be able to improve their lives. Less must be consumed and, perhaps, produced.

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[137] Oberthur & Ott, *supra* note 6 at 234.

CHAPTER 4

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES) AND INTERNATIONAL CONCERN FOR ENDANGERED SPECIES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[1] is significant to the overall theme of this thesis because it exhibits the vagaries of the complexities of global partnership on environmental matters. The difference between this treaty and the climate change regime examined in the preceding chapter is that the environmental problem sought to be averted under CITES is focussed on resources predominantly located in the South. The importance of this point is that, since the resources are in the South, the competing concepts of sovereignty and global partnership are more obvious.

The reasons for trade in wild flora and fauna vary and these reasons have over the years expanded the scope of the demand on wild flora and fauna, emphasizing the need for regulation. The effort at regulation itself is, however, faced with obstacles, resulting in compromises which are well known at negotiations of international treaties. The legal regime for the conservation of wildlife is no different in this regard. This chapter will examine the seeming contradiction in the need for development and survival and global concern over the rapid wildlife depletion. This contradiction is also often a source of differences between the North and the South. In the preceding chapter, the effort to enforce different standards in recognition of different capabilities and culpability of states in addressing climate change problems (CBDR principle) was shown to have

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[1] Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 12 I.L.M. 1085 (1973), online: UNEP <http: //www.cites. org/eng/disc/ text.shtml#texttop>[hereinafter CITES or the Convention] (date accessed: 11 March 2004).

been a continuing struggle.

In this chapter, the earlier discussed North-South attitudes will be examined against the background of the effort at combatting wildlife depletion. Continuing the trend of the previous chapter, this chapter will examine the struggle to meet basic needs of human survival in the South, and a pressing recognition of the need for global cooperation by the North for addressing wildlife depletion. This chapter will deviate from the "purely" environmental view of the preceding chapter as it will examine the issue of partnership and sovereignty from the angle of wildlife trade and restrictions. This is for the reason that since economics and politics appear to be important factors in the decisions of states regarding international agreements, this thesis will be incomplete without an examination of trade and the politics of trade in the international fora.

4.1 Background

International trade in wild flora and fauna has been going on for ages. Some of the developed countries benefited from such trade. In Australia and the Americas, countless species became extinct as a result of the human occupation of the continents – mostly due to large-scale commercial hunting for the purpose of trade.[2] This point is relevant as will become clear shortly. One of the thrusts of the arguments offered by developing countries is that the North became developed at the expense of the extinct species and the South should be allowed similar latitude.

Why is international trade important to a discussion on wildlife extinction? It has been shown that when trade in wildlife is uncontrolled or mismanaged, not only is the survival of particular species directly threatened, but because the ecosystem is interrelated, every other life form

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2 S. Fitzgerald, *International Wildlife Trade: Whose Business Is It?* (Washington, D.C.: World Wildlife Fund, 1989) at 6-8.

is also jeopardised.[3] Since there is a food-chain order, the continued existence of life forms depends on that of another. Conversely, population control of some species depends on predators and when this is upset, some species become pests, forcing an increased dependence on chemicals to reduce the population of such pests. Apart from the threat to the pattern of relations between organisms and the environment, the extinction of wildlife species could also deprive the medical and scientific field of important breakthroughs.[4] There are various examples of such previous scientific breakthroughs: diseases such as cancer, arthritis and hemophilia are reputed to have benefited from research into various life forms.[5] Furthermore, wildlife are used to produce vaccines, test drugs and isolate the causes of life-threatening diseases such as cardiac diseases and hepatitis.[6] It has been said that "one-fourth of all prescriptions written in the United States contain an ingredient derived from plants, many from the tropics."[7] In the field of agriculture, research and crossbreeding of plant species have resulted in more pest-resistant species.[8] Such crossbreeding has also resulted in foods that help human physiology resist diseases.

In light of the above considerations, it then becomes understandable why there have been arguments proffered against exploitation of species to the level of extinction. There have been several arguments for both sides of the debate on extinction. One argument is the possibility of economic devastation as a result of extinction.[9] According to this view, wildlife will no longer be

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3 *Ibid.* at 5.

4 *Ibid.*

5 P. Ehrlich & A. Ehrlich, *Extinction: The Causes and Consequences of the Disappearance of Species* (New York: Random House, 1981) at 23.

6 Fitzgerald, *supra* note 2 at 6-8.

7 *Ibid* at 12.

8 *Ibid.*

9 *Ibid.* at 12

available to "future consumers, hunters, fishermen, sightseers, nature lovers, and other wildlife "users" who provide important financial income to developing nations' economies."[10] Interestingly, the "economic" argument can also be proffered for the argument for continued unrestricted trade in wildlife.

The movement for wildlife conservation is based on two flawed assumptions – that international trade in flora and fauna is based partly on a market that is fuelled by the desire to own the unique and exotic species and, in the other part, that vendors are motivated by greed. These assumptions, unfortunately, downplay the necessity for trade by some countries. For some countries, wildlife form the bulk of their natural resources.[11] It appears to be a double standard now for a strict regime to be imposed on international trade in wildlife that happens to be concentrated in the developing countries. However, the sociological aspects of this argument are beyond the scope of this thesis. The goal here is to show that with the background attitudes to treaty negotiations, the essence of global cooperation may be seriously jeopardised.

4.2 The Views on Wildlife: Conservation or Utility?

Earlier in this thesis, the issue of the concerns of developing countries for their welfare *vis-à-vis* those of the developed countries about conservation was mentioned. Undoubtedly, the positions maintained by the parties of the North and the South are influenced by the views of both sides about the reasons for the existence of the species in the ecosystem. The conflict appears to be between balancing the views on conservation and the views on human survival. As will be

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10 *Ibid.*

11 See for instance, reports about Kenya which show that Kenya in 1997 had estimated total earnings of USD 388 Million from trade associated with wildlife. Online: UN <http://www.un.org/esa/agenda21/natlinfo/niau/kenyanp.htm> (date accessed: 11 March 2004).

discussed shortly, the debate about the effectiveness of CITES has been parallelled by a debate about the philosophical justification for the protection of particular species. At the twelfth Conference of the Parties (COP-12) to CITES convened from 3-15 November 2002, in Santiago, Chile, with approximately 1,200 participants representing governments, intergovernmental and non-governmental organizations, delegates made 60 proposals and more than 60 resolutions on a range of topics, including, *inter alia*, strategic and administrative matters, implementation of the Convention, and consideration of proposals for amendment of Appendices I and II.[12] As with previous COPs, the outcomes reflected the underlying conflicts within CITES between balancing conservation and trade.[13]

Many inhabitants of developed nations regard these species that they seek to conserve as organisms of great aesthetic and intrinsic value and they are convinced that the need to preserve the species should override local human needs.[14] Most of the developing country parties view these same species as a source of food, medication or much needed foreign exchange. One good example is the African elephant. While developed nations see the elephants as "intelligent, awe-inspiring beasts,"[15] many people in the African range states see elephants primarily as a very viable source of foreign earnings. Ivory is used to manufacture objects of decorative value and has a large market

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12 See online: CITES <http://www.cites.org/eng/news/world/cop12_prop_results.pdf> (date accessed: 11 March 2004).

13 Karen Alvarenga *et al.*, "Summary of the Twelfth Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora" in Pamela S. Chasek, ed., Earth Negotiations Bulletin (Manitoba: The International Institute for Sustainable Development (IISD),2003),online: International Institute for Sustainable Development <http://www.iisd.ca /linkages /download/asc/enb2130e.txt> (date accessed: 11 March 2004).

14 J. Waithaka, "The Elephant Menace", *Wildlife Conservation*, March/April 1993, at 62 in P. F. Storey, "Development vs. Conservation: The Future of the African Elephant", (1994) 18 Wm. & Mary J. Envtl. L. 375 at 377 . See also the article by D. Western, "The Balance of Nature", March/April 1993 Wildlife Conservation 52.

15 Storey, *ibid.* at 375-76.

in the North. In modern industry, ivory is used in the manufacture of electrical appliances, including specialized equipment for aeroplanes.[16] In the South, other than as a source of foreign exchange, they are seen merely as "dangerous killers and destroyers of property."[17] The values are representative of the two primary theories of wildlife management: pure protectionism and sustainable use.[18]

From the foregoing, nations obviously place different values on protecting the environment *vis-à-vis* other goals. These values cannot be distanced from the economic needs of countries. Poorer countries are more focussed on the short-term results than the richer countries are.[19] Also, this fact cannot be considered independent of the fact that developing countries have the worst standards of living. Examining the mathematical facts of the World Bank data does not even begin to capture the total grim picture.[20] In some of the developing countries, families of four or more live on what amounts to less than 80 cents a day.[21] Against this background, it is difficult for these countries to match the fervour for wildlife preservation in the developed countries.

Even in cases where developing countries buy into the conservation theory of wildlife, their equal participation and contribution is unlikely. One major problem is the paucity of funds for the participation of developing countries at decision-making meetings. In the 2002 Chair's

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16 Learning Network, "Ivory: Uses of Ivory"in *The Columbia Electronic Encyclopedia* online: Family Education Network <http://www.infoplease.com/ce6/sci/A0858956.html> (date accessed: 11 March 2004).

17 Storey, *supra* note 14 at 376.

18 Sam B. Edwards, III, "Legal Trade in African Elephant Ivory: Buy Ivory to Save the Elephant?"(2001) 7 Animal L.119 at 128.

19 S. Charnovitz, "Recent Developments: Environmental Trade Sanctions and The GATT 1994: An Analysis of The Pelly Amendment on Foreign Environmental Practices" (1994) 9 Am.U J. Int'l L. & Pol'y 751 at 755.

20 World Bank, "Appendix 1", online: WorldBank <http://http://www.worldbank.org/prospects/ gdf2000/ app1.pdf> (date accessed: 17 May 2003).

21 This is from the writer's personal experience with some families in Nigeria, Africa. Families of five or six have been known to live on N60 a day (CAN$1=N70).

report of the Animals Committee, Chair Hoogmoed said that if the new chair of the Animal Committee is from a developing country, extra funding would have to be found.[22] It therefore remains to be seen, given the foregoing, that any cooperation by the North and the South on curbing trade in wildlife, will be effective. This chapter will examine CITES against the background of the North -South participation in the trade-reducing wildlife conservation effort.

4.3 The Fundamental Objectives of CITES

During the 1960s, it became increasingly obvious to the global community that international trade was contributing to the depletion of many plant and animal species. By 1993, international trade was said to be worth between US$5 billion and US$17 billion per year.[23] In 1996, the International Union for the Conservation of Nature (the IUCN, formerly known as the World Conservation Union or WCU) estimated that a total of 11,046 species of plants and animals were facing a high risk of extinction in the near future, a figure that included 24% of mammal species and 12% of bird species.[24] IUCN followed up in 2000 when it enumerated 18,276 species and subspecies on its list of endangered species, including a total of 520 species of mammals and 503 species of birds.[25] Between 1963 and 1972, the World Conservation Union worked toward getting an international commitment to establish a Convention to regulate the export, transit and

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22 Wendy Jackson, Alison Ormsby & Mark Schulman, "Summary of the 18th Meeting of the CITES Animals Committee" in Chasek, *supra* note 13.

23 D. Favre, " Debate Within the CITES Community: What Direction for the Future? (1993) 33 Nat. Resources J. 875 at 887.

24 Online: Forest Networking <http://forests.org/recent/2000/cogradds.htm> (date accessed: 11 March 2004).

25 Elisabeth M. McOmber, "Problems in Enforcement of the Convention on International Trade in Endangered Species" (2002) 27 Brooklyn Journal of International Law 673.

import of rare or threatened wildlife species.[26] In 1963, the IUCN began drafting an international Convention in order to regulate the trade of rare or threatened wildlife species.[27]

CITES was adopted on March 2, 1973 and entered into force on July 1, 1975[28] with the main objective of saving wildlife from extinction by the regulation and restriction of international trade in wildlife. This chapter will examine the questions inevitably raised by the adoption of CITES. The questions include: how are the developing countries to obtain alternative foreign exchange earnings while following the program for conservation drawn up in practice largely by developed countries? (This becomes a bigger issue against the background of sovereignty concerns of developing countries). More relevant, do the provisions of CITES contravene the spirit and intention of Permanent Sovereignty over Natural Resources (PSNR) and the World Trade Organisation (WTO) General Agreement on Tariffs and Trade (now GATT 1994)?[29] If they do, how have these been resolved? To address these questions, this chapter will first examine the objectives and major provisions of CITES.

The Convention's major goals are to: "monitor and stop commercial international trade in endangered species; maintain species under international commercial exploitation; and assist countries toward a sustainable use of species through international trade."[30] In short, the fundamental

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26 Jackson, Ormsby & Schulman *supra* note 22.

27 *Ibid*

28 *Ibid.*

29 Marrakech Agreement on the World Trade Organization: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994,33 I.L.M. 1 (1994). GATT 1994 is in Annex 1A of the WTO Agreement. Prior to the Final Act, the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187, it was applied through the Protocol of Provisional Application. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A2051, 55 U.N.T.S. 308. The rules of GATT 1994 now constitute the principal rules of a larger agreement and formal international institution, the World Trade Organization (WTO).

30 See online: IISD <http://www.iisd.ca/process/biodiv_wildlife-citesintro.htm> (date accessed: 11 March 2004).

problem sought to be addressed by CITES is the decline in biodiversity levels and the increase in the extinction of species. However, it has the limited and specific objective of relieving only one of the pressures that biodiversity is subjected to, that is, the consumer demand for endangered species transmitted through international trade.

It is well-known that international trade is not the most significant threat to most threatened species.[31] It ranks below habitat loss, reduction of range, pollution and pesticide use, introduced species and subsistence hunting.[32] The direct role of international trade is said to be generally less significant in species extinction relative to other factors, particularly habitat loss, introduction of alien species to ecosystems and domestic commercial use.[33] For instance, although game meat plays a critical role in community life in most developing countries, if domestic trade continues at the rate it is now it may soon rival international trade as a threat. In fact, at the 18th annual meeting of the CITES Animals Committee in San Jose, Costa Rica, the African representative in his presentation of the regional report, pointed out that international trade in bushmeat (the general term in the South for game meat) as well as trade in reptiles and amphibians had increased.[34] However, this writer acknowledges that domestic trade regulation may well be outside the ambit of international efforts to control the decline and extinction of species as that may

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31 Morné A. Du Plessis, "CITES and the Causes of Extinction" in J. M. Hutton & B. Dickson, eds., *Endangered Species Threatened Convention. The Past, Present and Future of CITES* (London: Earthscan Publications Ltd., 2000) at 13. See the online version of the book – online: Resource Africa <http://www.resourceafrica.org /cites/ch02.html> (date accessed: 15 March 2004).

32 *Ibid.*

33 *Ibid.*

34 See online: CITES <http://www.cites.org/eng/cttee/animals/18/E18-05-1-R1.pdf> (date accessed: 11 March 2004).

necessitate stronger arguments against sovereignty and PSNR.[35] In any event, the PSNR is explicitly recognised by CITES in Article III.

Although there are various operational bodies as well as several advisory committees and sub-committees, in order to respect the concept of state sovereignty of the various party states, CITES does not purport to inflict any central system on the parties.[36] This in itself, creates the problem of enforcement which will be discussed in the following chapter. The prescription by CITES for reducing or erasing the decline and extinction of species is a mixture of international trade bans on the most endangered wildlife species and regulation of trade in less seriously threatened species.[37] CITES embodies the principle that no single country can protect certain species of wild fauna and flora against over-exploitation by international trade and that international cooperation is essential.

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35 See discussion on PSNR in chapter 2 on the climate change regime. PSNR is a recognition of states' rights to do what they want with the natural resources within their territory. This is however balanced by the customary law to refrain from doing transboundary harm.

36 Saskia Young, "Contemporary Issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use" (2003) 14 Colo. J. Int'l Envtl. L. & Pol'y 167 at 173.

37 CITES *supra* note 1, Articles II, III, IV and V. Also, Appendix I of CITES includes species threatened with extinction. Trade in specimens of these species is permitted only in exceptional circumstances; Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival; and Appendix III contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade.

4.4 CITES Trade Measures

If CITES has no remedy for the majority of threats to wildlife existence, how does it address its particular stated objectives? The regulation of international trade is carried out under CITES through a system documentation called "permits" and "certificates" that are required for import and export purposes. Each party to CITES must create the necessary domestic for the purpose of designating a management authority responsible for issuing the said permits, based on the advice of a scientific authority,[38] and maintain trade records to be forwarded to the CITES secretariat annually.[39] Apart from the use of export and import permits, the Convention's trade measures include the provisions on the listing of species and on trade with non-parties to the Convention.

a. Import and Export Permits

CITES regulates international trade in wildlife through a system of import and export permits. Under CITES, species to be regulated are divided into three categories:

(1) those threatened with extinction;

(2) those that may become endangered unless trade is regulated; and

(3) those that a party identifies as being subject to regulation within its own jurisdiction and as requiring international cooperation to control trade.[40]

All together, there are more than 30,000 species of plants and animals are protected

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38 Jackson, Ormsby & Schulman, *supra* note 22.

39 *Ibid.*

40 These species are listed in CITES *supra* note 1 Appendices I, II, and III respectively.

in one way or the other by CITES.[41] Appendix I lists species that are considered the most endangered among CITES-listed animals and plants.[42] These are species threatened with extinction and CITES generally prohibits commercial international trade in specimens of these species. However, trade may be allowed under exceptional circumstances.[43] A reading of Article III suggests that trade may be carried on in Appendix I species for any circumstances considered exceptional, as long as it is not for "primarily commercial purposes." In instances of trade in Appendix I species, it may be authorized by the granting of both an export permit (or re-export certificate) and an import permit. Appendix II[44] lists species that are not necessarily presently threatened with extinction, but that may in future be threatened unless trade is closely controlled.[45] International trade in specimens of Appendix II species may be authorized by the granting of an export permit or re-export certificate. Permits or certificates should only be granted if the concerned authorities are satisfied that certain conditions are met, that is, that the specimen was not obtained in contravention of the laws of the state concerned, that the living specimen will be readied and transported with attention to any risk

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41 CITES, "What is CITES?" Online: CITES <http://www.cites.org/eng/disc/what.shtml > (date accessed: 11 March 2004). Species in listed in Appendix I, i.e, the first category, include approximately 600 animals and 300 plant species. Species in the second category listed as Appendix II includes about 4,000 animals and 25,000 plant species, including so-called "look-alike species", i.e., species of which the specimens in trade look like those of species listed for conservation reasons. See OECD, Joint Working Party on Trade and Environment, *Trade Measures in Multilateral Environmental Agreements: Synthesis Report of Three Case Studies, Working* Chapter no. 12 (Paris: OECD, 1999) at 12.

42 CITES, *supra* note 1 Article II, paragraph 1.

43 See generally CITES *Ibid* Article III. Appendix I species can only be traded in if (1) the export will not be detrimental to survival of the species; (2) the specimen was not obtained in violation of the exporting country's laws for protection of wildlife; (3) living specimens are prepared and shipped to minimize the risk of injury, adverse health effects or cruel treatment; and (4) the exporting state is satisfied that an import permit has been granted by the destination state. Imports can only be made if the importing country: (1) is advised by its Scientific Authority that the import will not be detrimental to the survival of the species; (2) is assured by the Scientific Authority that any recipient of a living specimen is able to properly care for it; and (3) is satisfied that the species will not be used for primarily commercial purposes.

44 OECD, *supra* note 41 at 12.

45 CITES, *supra* note 1 Article IV.

of damage or injury and, above all, that trade will not be deleterious to the continued existence of the species.[46]

Appendix III is a list of species included at the request of a party that already regulates trade in the species and needs the cooperation of other countries to prevent unsustainable or illegal exploitation.[47] International trade in specimens of species listed in this Appendix is not banned, but allowed only within the system of the requisite permits or certificates.[48]

Listing on the appendices is not permanent. Species may be added to or removed from Appendix I and II, or moved between them. However, this can only be done by decision of the Conference of the Parties,[49] either at its regular meetings or by postal procedures.[50] Provisions regarding Appendix III are more lenient because species may be added to or removed from Appendix III at any time by any Party.[51] Parties may also enter reservations with respect to any species listed in the Appendices in accordance with the provisions of Articles XV, XVI or XXIII of the Convention.

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46 *Ibid.*

47 *Ibid.* Article II, paragraph 3.

48 *Ibid.* Article V. Appendix III covers about 200 animals and 6 plants. See also OECD, Joint Working Party on Trade and Environment, *supra* note 36 at 12.

49 The Conference of the Parties (COP) is the organ of CITES charged with: reviewing the implementation of the Convention; making such provision as may be necessary to enable the Secretariat to carry out its duties; adopting financial provisions; considering and adopting amendments to Appendices I and II in accordance with Article XV of the Convention; reviewing the progress made towards the restoration and conservation of the species included in Appendices I, II and III of CITES; receiving and considering any reports presented by the Secretariat or by any Party; and where appropriate, making recommendations for improving the effectiveness of the Convention.

50 The "postal procedure" is set out in Article XV of the Convention for the categories of "marine species" and "species other than marine species". For the former, scientific data must be obtained from inter-governmental bodies having a function in relation to those species.

51 The Conference of the Parties has recommended that changes be timed to coincide with amendments to Appendices I and II.

b. The CITES Listing Device

This section discusses how, in practical terms, species get placed on or taken off any of the Appendices. How much of an input do the affected countries get to make in the decision to list or delist? In other words, if a specie is found predominantly in a region or state, does it not encroach upon the nation's sovereignty over its natural resources when other states make these decisions?

A lot has happened since the original drafting of CITES. At various times, important steps have been taken toward the construction of an organisational pattern.[52] At the time the Convention was drafted there were no discernable concrete criteria for listing species in any of the appendices. However, at the first COP held in Berne, Switzerland in 1976, the "Berne Criteria," as the criteria contained in Resolutions Conf.1.1 and 1.2 came to be known, were established.[53] The Resolutions provided that listing of species should be subject to certain biological standards and differing standards of evidence of trade.[54] For species to be listed on Appendix I, biological evidence had to show that the species "was currently threatened with extinction" by the "probability" of trade, whereas for listing in Appendix II, the evidence only had to show a probability of extinction and evidence of trade had to be tied to the potential threat to the survival of the species. The biological gauges or determinants, included "population size and geographic range."[55]

The criticism of these criteria forced a second look at the merits of the trade

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52 See generally, online: CITES <http://www.cites.org/index.html> and especially at <http://www.cites.org/eng/disc/org.shtml> (date accessed: 11 March 2004).

53 Parties to CITES, Resolution Conf. 1.1, Criteria for the Addition of Species and Other Taxa to Appendices I and II and for the Transfer of Species and Other Taxa from Appendix II to Appendix I, online: CITES <http://www.cites.org/eng/resols/index.shtml> (date accessed: 7 April 2003).

54 *Ibid.*

55 *Ibid.*

measures.[56] The particulars of the case of the listing of the African elephant exposed the relative impotency of the criteria.[57] Some developed states spearheaded the listing of the African Elephant on the more restrictive Appendix I at COP7 despite objections from the Southern African nations of Zimbabwe, Botswana, Namibia and South Africa. However, in spite of the listing of the African elephant on Appendix I of CITES, its population has been greatly reduced. While the CITES ban effectively lowered the trade in ivory, it led to the killing of more, rather than fewer, elephants.[58] This was as a result of the frequent encroachment of the elephants on farmlands, which angered the farmers who, in turn, killed more elephants. The Fort Lauderdale Criteria emerged from these types of situations.[59]

The Fort Lauderdale Criteria addressed some concerns generated by the Berne Criteria. First it provided for "downlisting" of species from Appendices I to II where it is found that the particular species has ceased to belong in Appendix I, and it also provided for 'Split-Listing'.[60] Split-Listing is the simultaneous listing of one population of a species in Appendix I and another population of the same species in Appendix II. It provided for different trade and biology standards from the ones set by the Berne Criteria. Under the Fort Lauderdale criteria, a species, to be included in Appendix I, should be shown to be or may be affected by trade and it must also meet one of four

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56 Harvard Law Review "The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decisionmaking" (2001) 114 Harv. L. Rev. 1769.

57 Kym Anderson, "Environmental and Labor Standards: What Role for the WTO?" in Anne O. Krueger, ed., *The WTO as an international organization* (Chicago: University of Chicago Press, 1998) 231 at 243.

58 *Ibid.*

59 Harvard Law Review, *supra* note 56 footnote 81.

60 *Ibid.* at 1777.

broad biological criteria.[61] This should, at least, prevent the recurrence of the African elephant situation.

One point which is obvious from the history of the development of these criteria is that the political considerations outweigh any others on all fronts. CITES is one of the more controversial international conventions. Some have linked the "failure" of the treaty to lack of enforcement and others argue that the foundation of CITES is basically flawed.[62] This chapter is aligned with the latter view. CITES is based on western conceptions of the value of wildlife in absolute terms and even on the concept of the causes and effects of extinction. That, as observed earlier, does not exactly help to translate the provisions of CITES into practice. More important, however, is the fact that CITES in the international context is a potentially ineffective convention because it lacks provisions for steps to be taken to enforce the agreement against reluctant parties.[63] Because CITES essentially relies on negative incentives, it might be a good idea to examine the possibility of positive incentives in the form of capacity building or some form of credits for compliant parties.

c. Trade With Non-parties to CITES

Article X of CITES, titled "Trade with States not Party to the Convention," provides that:

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61 *Ibid.* 1779-1780. These four criteria are: that the wild population is small; that the population has a restricted area of distribution; that the population is declining; and that, but for inclusion in Appendix I, the species will satisfy one or more of the previous criteria within five years.

62 J. M. Hutton & B. Dickson, "Introduction" in Hutton & Dickson, *supra* note 31 at XV. See also online: Resource Africa <http://www.resourceafrica.org/cites/intro.html"> (date accessed: 15 March 2004).

63 Anthony D'Amato & Kirsten Engel, eds., *International Environmental Law Anthology* (Cincinnati: Andersen Publishing Co.,1996) at 242.

> Where export or re-export is to, or import is from, a state not a Party to the present Convention, comparable documentation issued by the competent authorities in that state which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party.

The provision on non-parties is not an unusual treaty clause and, in this instance, the reason for its inclusion is the same as in other treaties with similar provisions – it seeks to control or direct the actions of states that have not agreed to be bound by the terms of the CITES in order to enhance the effectiveness of the treaty. It goes a step further to regulate the nature of the relationship between parties when one of them has entered a formal reservation on a particular listed species.[64] CITES allows trade with non-parties provided that the non-party issues "comparable documentation... which substantially conforms with the requirements" of CITES.[65] The parties strengthened this provision by resolution because wildlife traders found mechanisms to use non-parties as conduits to "legalize" trade that CITES otherwise would prohibit.[66] The parties declared that they would accept "comparable documentation" from a non-party only if the non-party provided information to the Secretariat about its competent authorities and scientific institutions.[67]

The parties also recommend that trade with non-parties in Appendix I specimens

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64 Article XXIII (3) provides that when a party enters a specific reservation with regards to any of the species listed in the appendices or any parts or derivatives of a species included in Appendix III will be treated as if it wereas same as if it were a non-party for the purposes of such species it has entered a reservation in respect of. See also D.S. Favre, *International Trade in Endangered Species, A Guide to CITES,* (Dordrecht/ Boston/ London: Martinus Nijhoff Publishers, 1989) at 251.

65 CITES *supra* note 1 Article X.

66 CITES, Conference Resolution 9.5, para. b, in Proceedings of the Ninth Meeting of the Conference of the Parties (1994), online: CITES <http://www.cites.org/eng/resols/9/9_5.shtml> (date accessed: 15 March 2004). See also Young, *supra* note 36 at 179.

67 *Ibid.*

should occur only in "special cases where it benefits the conservation of the species or provides for the welfare of the specimens, and only after consultation with the Secretariat."[68] Article X of CITES appears to weaken the provisions of the Convention as it provides an incentive for states' non-compliance.

Article X is capable of being subjected to the widest interpretations. What happens, for instance, in a situation where a specimen is placed before a customs agent of a party state, and a piece of paper submitted as an export permit is signed by a purported official of a non-party state? How is the customs agent to determine whether that piece of paper meets the requirement of Article X or not, i.e., whether the document is comparable documentation issued by a competent authority within the purview of CITES?

One fact that is obvious is that most developing country parties lack the trained human resources and the expertise to determine whether the permit meets the CITES requirements or not.[69] Consequently, even though they are willing to commit on paper to CITES, they in fact are not in the position to carry out the spirit of the Convention and, as will be discussed in the following chapter, the effectiveness of the Convention is then doubtful at best, when capacity is lacking.

Another scenario that bears scrutiny is the case of trading non-party partners. The trade between both of them is limited by domestic legislation as opposed to international agreement. If these hypothetical non-party states are not bound by CITES, obviously, trade by these states is detrimental to the effectiveness of CITES. How does CITES anticipate this and prevent it from derogating from the effectiveness of the treaty?

There was initially some debate about the language of Article X and whether the

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68 *Ibid.*, Para. e.

69 For instance, in cases where they are the importing countries in the scenario above.

phrase "may be accepted" makes the provision optional.[70] When Article X is combined with other provisions of CITES (for instance Article II (4) binds a party to trading only within the guidelines of CITES), Article II (4) does not distinguish between circumstances where the projected trading partner is a party and where it is not. This writer believes that the wording of Article X makes it mere recommendation and non-binding. The overall effect of Article X is that parties and non-parties are placed on the same footing for the purposes of trade restrictions. Although the provisions on trade with non-parties are meant to encourage countries to sign and implement the agreement, help ensure effective enforcement of the agreement and, ultimately, help with the objectives of the Convention, because these provisions intentionally discriminate against non-parties, they appear to conflict with GATT 1994 provisions. This will be discussed in detail later in this chapter. Suffice it for now to say that, if CITES can be said to discriminate against non-parties, the developing countries may well be said to be parties to CITES under some form of coercion. This certainly does not do much for the attainment of the objectives of CITES.

4.5 CITES and Non-Governmental Organizations

Another important issue is the actions of non-state actors, NGOs for instance. There has to be an acknowledgment of the role of non-state actors in international affairs. A brief look at two theories of international law – the realist and the social constructivism theories – on the role of state and non-state actors may help in defining the role that non-state actors play, the role they should play and how that will eventually affect the effectiveness of the Convention. Traditionally, the theory of realism, for example, only recognises the parts states play in international affairs, based

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70 See Charnovitz, *supra* note 19 at 801-802.

on their interests.[71] Such views do not consider the origin of the states' interests, thereby ignoring the effect and participation of other stakeholders. The theory of social constructivism, on the other hand, looks at the role of non-state actors (a group which includes non-governmental organizations (NGOs)) in defining international law.[72]

International law as it presently stands, adopts the realist theory in dealing with non-state actors, i.e., NGOs and other non-state actors are not considered to be subjects of international law.[73] The effect of this is the tendency by the international law community to ignore the vital role that non-state actors play in international legal relations.[74] Currently, non-state actors attend CITES COPs as observers, and there are channels for airing their observances.[75]

However, it may be more prudent to explore in the international fora a redefinition of the roles and responsibilities of the NGOs. Their importance cannot be overstated because they are not bound by the territorial boundaries that states are, they have the advantage of being more environment goal oriented than politics-oriented, and they have in the past proved to be very useful at treaty negotiations, implementation and exerting all forms of pressure for compliance.

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71 T. Hunt, "People or Power: A Comparison of Realist and Social Constructivist Approaches to Climate Change Remediation Negotiations "(2001) 6 UCLA J. Int'l L. & Foreign Aff. 265 at 277.

72 *Ibid.*

73 *Ibid.* at 289-290.

74 See Stephan Hope, "Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations" (1997) 5 Ind. J. Glob. Leg. Stud. 191. See also Marissa A. Pagnani, "Environmental NGOs and the Fate of the Traditional Nation-State" (2003) 15 Geo. Int'l Envtl. L. Rev. 791.

75 See Article XI (7). Further to this point, see online: CITES, "Recognition of the Important Contributions Made by Observers to the CITES Process at the Meetings of the Conference Of the Parties" <http://www.cites.org/eng /cop/11/docs/16.pdf> (date accessed: 11 March 2004); CITES Report: Thursday, April 13, 2000, Online: Wildnet Africa <http://wildafrica.net/cites/messages/11.html> (date accessed: 11 March 2004).

4.6 CITES and Non-compliance

At the tenth CITES COP held in Zimbabwe in 1997, the parties acknowledged the need for more effective measures of dealing with non-compliance by parties.[76] To this effect, the Committee "assigned the issue to a working group, which came up with a more complete, clear, and fair policy, which will include the option of leviling [*sic*] trade sanctions."[77] As will be discussed in the fifth chapter of this thesis, non-compliance is not necessarily automatically equated to ineffectiveness. The issue of trade sanctions also raises other problems.

As the Convention deals with import and export issues with special attention to proposed trade sanctions, the question that must be addressed is whether the provisions of CITES contravene the provisions of other multilateral trade agreements. An answer is necessary in the light of the argument that restrictions on international trade intrude much less on state sovereignty than, for example, efforts to limit habitat destruction,[78] and that efforts at the international level can effectively protect species threatened by international trade.[79] These two arguments appear to be based on R.B Martin's argument, reproduced later in this chapter, that CITES is an ineffective agreement because it makes certain assumptions.

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76 See online: CITES <http://cites.org/eng/cop/10/E10-Decisions.pdf> (date accessed: 11 March 2004).

77 See Wildnet Africa, *supra* note 75.

78 L. H. Kosloff & M. C. Trexler, " The Convention on International Trade in Endangered Species: No Carrot, but Where's the Stick?" (1987) 17 Envtl. L. Rep. 10,222, at 10,226.

79 W. Wijnstekers, The Evolution of CITES Online: <http://www.cites.org/CITES/ common/docs /evolution.pdf.> (date accessed: 11 November 2003). Wijnstekers said: "The importance of international cooperation in this area is obvious as wildlife exploitation levels depend in many cases on markets elsewhere. Poaching and smuggling of animals and plants is frequently only driven by the prices in consumer countries."

4.7 The World Trade Organization Agreement/General Agreement on Tariffs and Trade (GATT)[80]

The General Agreement on Tariffs and Trade (now GATT 1994) is a multilateral agreement which has provided a system of organisation for the world's trade for more than five decades. It is now one element of the World Trade Organisation (WTO) Agreement. Toward the achievement of better global living standards, a major aim of GATT 1994, all parties to GATT 1994 must be allowed to participate in trade it considers suitable to it.[81] This is the first major point of conflict between GATT 1994 and CITES. If the assumption is that many developing countries depend on trade in their natural resources, one of which just happen to be the world's endangered species, the benefit of liberalized trade in species of flora and fauna will at best accrue to developing countries in a limited form because of CITES.

Other relevant provisions of GATT 1994 are Article I which obligates parties to treat all states in a trade relationship with it in the same manner.[82] Article III goes a step further and prohibits a party for giving preferential treatment to products from its territory, over and above similar products imported from other states. This is known as "the national treatment principle"[83] and is not restricted to sales alone. The provision extends to taxes and levies. To this end, Article XI (1) provides that parties are to restrict levies on trade to taxes or duties as opposed to the use of bans and quotas.

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80 *Supra* note 29.

81 A. C. Raul & P. E. Hagen, "The Convergence of Trade and Environmental Law"(1993) 8 (Fall) Nat. Resources & Env't 3 at 4.

82 This is also known as the Most Favored Nation (MFN) principle. See also, Raul & Hagen, *ibid.*

83 *Ibid.*

4.8 CITES and GATT 1994

From the preceding discussion, neither a conflict nor a convergence of the objectives of CITES and GATT 1994 is immediately apparent. The question to be asked here is if there are any such points of convergence between trade and environmental protection? The first point to be noted is that an application of Article XI (I) of GATT 1994 could render CITES trade measures a violation of GATT 1994. GATT 1994 provisions on environmental protection, which are both indirect, are found as exceptions to Article I on trade liberalization.[84] The provisions are in Article XX (b) and (g) and are discussed in more detail below.

As obvious from the objectives of CITES, environmental problems can be caused by trade. From a plethora of cases discussed below, international trade rules in GATT 1994 have been shown to conflict often with certain environmental objectives. Under CITES for instance, split-listing places certain species on both Appendices I and II. The effect of this is that some populations of the same species may be contained in Appendix I and other populations in Appendix II. Where this happens, it means that a specie of wildlife on Appendix II, and not absolutely banned in one country, may be on Appendix I and thus absolutely banned from trade in another country. This appears to go against the basic GATT 1994 principle of the Most Favored Nation treatment under Article I of GATT 1994[85] since Article I of GATT 1994 requires WTO members to treat "like" products in the same way, regardless of the originating country. The question of species of fauna and flora taken from the wild as like products of their captive-bred, ranched or propagated counterparts is relevant here, where a country permits imports of one kind and prohibits imports of the other.[86]

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84 *Ibid.*

85 Chris Wold, "Multilateral Environmental Agreements and the GATT 1994: Conflict and Resolution?" (1996) 26 Envtl. L. 841 at 848.

86 OECD, *supra* note 41 at 33.

Would such a country be flouting the rules of GATT 1994? How precisely do the exceptions to Article I of GATT 1994 operate?[87]

The relationship between GATT 1994 and CITES has been discussed under the following sub-headings and for ease of discussion, some of the sub-headings relevant to this chapter will be adopted.[88]

a. No Detriment Finding

CITES provides that "countries importing Appendix I species and countries exporting Appendix I or II species must determine that the import or export will not be "detrimental to the survival of the species.""[89] A ban based on a "finding of detriment" might be challenged as a restriction contrary to the provisions of Article XI (1) of GATT 1994. As pointed out earlier, Article XI (1) prohibits the use of any other restrictions on imports or exports other than levies. However, a ban may be justified if domestic trade in same specimens is also banned. Article III (4) contains the "same treatment" provision, it follows that Article III (4) requires a party to restrict domestic trade in a CITES-listed species to the same degree it restricts imports of the same species. Split-listed species are not always covered by the "same treatment" provision though. If a domestic species is not in any of the lists, then it is not considered endangered by international trade and must be so exempted. It can be said that Article III (4) may not always require similar trade restrictions

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87 See John H. Jackson, " The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results (1997) 36 Colum. J. Transnat'l L. 157. See also An Chen, "The Three BIG Rounds of U.S. Unilateralism Versus WTO Multilateralism During the Last Decade: A Combined Analysis of the Great 1994 Sovereignty Debate, Section 301 Disputes (1998-2000), and Section 201 Disputes (2002-Present)" (2003)17 Temp. Int'l & Comp. L.J. 409.

88 Wold, *supra* note 85 at 874 - 880.

89 *Ibid.* at 874. See CITES *supra* note 1 Article III (3).

on look-alike species.

What is the effect of a finding of detriment? A finding of detriment under CITES means that trade otherwise allowed will contribute to the extinction of a species and thus must be disallowed. This finding is broad enough to cover the species and not only particular types of wildlife. If a WTO dispute settlement panel concludes that such a finding violates national treatment, the said finding could be justified as an exception covered under Article XX (b).[90]

Article XX provides that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...
>
> (b) necessary to protect human, animal or plant life or health; [or]...
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

In light of the above, Article XX of GATT 1994 appears to provide an escape route for environmental measures which would otherwise violate GATT major provisions. A party may

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90 See Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 22.2, WTO Agreement, Annex 2 [hereinafter DSU]. The Dispute Settlement Body (DSB) consists of all WTO member governments and supervises the WTO dispute settlement process. The DSB formally adopts dispute panel reports if they are not appealed. If the report is appealed to the WTO Appellate Body, the DSB formally adopts the panel reports as modified by the Appellate Body. The DSB may fail to adopt a panel report by consensus, including the consent of the winning party, but this has never happened. Under the DSU, if the defending government fails to bring its WTO-inconsistent measure into compliance, the complaining government, after 20 days of negotiations, may request authorization from the DSB to suspend concessions. DSU Art. 22.3. If the defending government objects to the level of suspension proposed, it may seek arbitration. DSU Art. 22.6. The decision of the arbitrator(s) is final. DSU Art. 22.7. Note also that the DSU can be used for a complaint against another country that does not allege a violation of WTO rules. DSU Art. 26. See Steve Charnovitz, "Rethinking WTO Trade Sanctions" (2001) 95 A.J.I.L. 792.

vindicate a measure which contravenes a major GATT 1994 obligation under Article XX (b) or (g). These exceptions justify environmental trade measures (ETMs) in international agreements. Before what has popularly come to be known as the Shrimp/Turtle cases,[91] no GATT/WTO panel had validated any environmental measure based on the Article XX (b) and (g). For instance, the 1991 Dispute Panel Report in United States – Restrictions on Imports of Tuna from Mexico[92] – rejected the Article XX (b) argument on the basis that the ban was not necessary to protect animal life. It also concluded that Article XX (g) applied only to measures aimed at rendering domestic restrictions effective and not to measures taken jointly with, or otherwise related to, domestic restrictions.[93]

In the Shrimp/Turtle cases, concerning an import ban imposed by the U.S. under its Marine Mammals Protection Act (MMPA), the Appellate Body upheld the offending Section 609 of the MMPA as falling within the environmental exceptions envisioned by Article XX (g), thus enlarging the scope of Article XX exceptions, although the ban was not ultimately permitted according to the introductory paragraph (*Chapeau)* of Article XX.[94]

Although the provisions of Article XX (g) of GATT 1994 may be redundant in a consideration of CITES considering as its focus is only on international trade. "[D]omestic production or consumption" are outside the purview of CITES. However, a domestic restriction may

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91 World Trade Organization: United States--Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, 37 I.L.M. 832 (1998) [hereinafter Dispute Panel Report I]; and World Trade Organization: United States – Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, 38 I.L.M. 118 (1999) [[hereinafter Appellate Body Report I]; Appellate Body Report on United States – Import of Certain Shrimp and Shrimp Products, Report of the Appellate Body, October 12, 1998. 1998 WT/DS58/AB/R [hereinafter Shrimp/Turtle Appellate Body Report].

92 Stemmed from United States – Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) (not adopted) [hereinafter Tuna- Dolphin I].

93 *Ibid.*

94 See Appellate Body Report, *supra* note 91. The Appellate Body later found that a revised import ban was acceptable under the GATT 1994.

not be necessary if it can be demonstrated that domestic consumption or production would not be detrimental to the survival of the species. For example, in the case of a species that is split listed because consumption of the imported species would threaten the population with extinction, a domestic restriction would be unnecessary if the listing excluded the domestic population.[95] A case in point here is the domestic consumption of game meat earlier mentioned. Developing countries will have to actively restrict the local consumption of game meat under a combined reading of CITES and GATT 1994 provisions.

The Tuna/Dolphin II panel,[96] indicated that a state should not be coerced into changing its "policies and practices" by the use of ETMs. However, from the plethora of cases that have come before the WTO, states have attempted to do just that. One of the signals that might be gotten from the decision of the Appellate Panel in the Shrimp-Turtle case is that a country like the U.S. may restrict trade with developing countries by its domestic legislation.

b. Humane Transport and Suitable Care

CITES provides that exporting countries (usually developing countries) are to ensure that live wildlife is transported in a manner that reduces "the risk of injury, damage to health or cruel treatment."[97] The importing state on its part, is to ensure that "the proposed recipient of a living specimen is suitably equipped to house and care for it."[98]

The point to bear in mind is based on the different views of the North and the South

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95 S. Charnovitz, "Green Roots, Bad Pruning: GATT 1994 Rules and Their Application to Environmental Trade Measures" (1994) 7 Tul. Envtl. L.J. 299 at 335-343.

96 GATT Dispute Panel Report on U.S. Restrictions on Import of Tuna, June 16, (1994) 33 I.L.M. 839 [hereinafter Tuna-Dolphin II].

97 CITES *supra* note 1 Articles III (2)(c), III (4)(b), IV (2)(c), IV (5)(b), V (2)(b).

98 *Ibid.* Articles III (3)(b), III (5)(b).

on the status of wildlife. The questions that immediately comes to mind are, who determines what is humane and under what circumstances? The determination is subjective and going by our earlier discussion of the value placed on animals by parties from the North and the South, the terms are not likely to be accorded the same meaning. What standards are then to be used in such determination? In situations where there is no consensus on the standards, how should the differences be resolved? This is a potential North-South divide point. It is unlikely that what an importer or exporter from the South will consider humane will be the same as one from the North. Practices that are considered humane in the South may be considered grossly inhumane in the North. Furthermore, going by the attitudes of states in the South, this may not exactly be a strong factor for consideration at the time of export. CITES as it stands right now is not equipped to deal with these questions.[99]

c. Primarily Commercial Purposes

An importing state must be satisfied that an import will not be for "primarily commercial purposes."[100] Although the WTO Appellate Body has acknowledged "the objective of sustainable development and the importance of protecting and preserving the environment,"[101] the original objective of states from the South is usually "primarily (for) commercial purposes." Although it is up to the importing state to determine the purpose of the import, this would appear to be contrary to the GATT 1994 objective of improving the global standard of living through liberalization of trade.

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99 See further on cultural differences, Richard Kirk Eichstaedt ""Save the Whales" V. "Save the Makah":The Makah and the Struggle for Native Whaling" (1998) 4 Animal Law 145, especially at 170.

100 Article III(3)(c).

101 Bruce Neuling, "The Shrimp-Turtle Case: Implications For Article XX of GATT and the Trade and Environment Debate"(1999) 22 Loy. L.A. Int'l & Comp. L. Rev. 1 at 279.

This means essentially that the importing country is in a manner granted the power to determine for the exporting country (usually developing states) what to do with its natural resources, in other words, a violation of the principle of permanent sovereignty over natural resources.

4.8 Conclusions

The concept of CITES is simple and laudable. However, the complexities of human nature and the laws of economics and commerce make the implementation of the treaty very difficult. The goal of CITES is to control, reduce or eliminate international trade in those species that obviously can only support further demand on them at the detriment of the species' continued existence. R. B. Martin in addressing this point, criticized the CITES approach in the following terms:

1. CITES operates in a vacuum, taking no account of human or economic considerations;
2. CITES focuses on the global level and does not consider status in individual countries; (This point may be moot now, as a new mechanism of national export quotas has evolved to allow for distinctions to be made between national populations of endangered species that are more suitably managed than others.[102])
3. CITES does not consider the possibility that trade may have benefits for species, ecosystems or people. This is based on the assumption that international trade is the greatest threat to species survival;
4. CITES "sees" itself as a science-based convention;

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102 OECD *supra* note 41 at 12.

5. CITES establishes an inflexible link between a species' perceived biological status and the manner in which it can be used;

6. The command and control structure of CITES leads to a preoccupation with law enforcement;

7. The development of CITES was primarily in the hands of the developed nations; and

8. No state carries the financial responsibility for the costs which it may be placing on another state in making decisions which affect other parties of CITES.[103]

CITES can be criticized on a number of grounds. The first argument is that the ambit of the treaty is too narrow. It may also be argued that the effectiveness of CITES is predicated on its narrow scope. However, since there are not really any international treaties that properly address the issues raised in this chapter, future COPs of CITES may do well to look at the modalities of widening the present scope of CITES. The increasing decline in and extinction of wild flora and fauna can be attributed to several other threats such as habitat destruction and deforestation, pollution, introduced species and climate change to mention a few. A combination of addressing some of these other threats may address the objectives of CITES better than the control or absolute ban on trade alone. This becomes increasingly obvious as most of the species that CITES seeks to protect are found within the territories of developing countries. These countries are dealing with issues of survival and the issue of wildlife extinction pales in comparison to that – especially considering the value that parties place on wildlife versus human life. It is unreasonable to expect that impoverished countries will neglect an available source of food or profit for the purposes of

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[103] R. B. Martin, "CITES and the CBD" in J. M. Hutton & B. Dickson, eds., *supra* note 31 at 129. See also online: Resource Africa <http://www.resourceafrica.org/cites/ch11.html> (date accessed: 15 March 2004).

preservation and conservation.[104] This writer certainly does not advocate that the problem of international trade should be totally ignored as the pressure of international demand is certainly a threat for a number of species,[105] but CITES has no remedy for any of the problems earlier mentioned.

The only way to actively involve the developing countries, in deed as well as in words, will be to address the other threats that directly and, in some cases, indirectly affect wildlife. A ready example is habitat loss. To address loss of wildlife habitat, issues such as poverty and lack of sustainable development must of necessity be resolved. The international community does not appear to look beyond the promises made and even the provisions that manage to be transformed into written domestic law. This is especially common in non-democratic countries. In some cases, some governments pursue policies that are not in their national interest.[106] It might then be easy to get acquiescence in writing in treaty law, but that does not translate into implementation in the domestic sphere. There are several factors that may contribute to noncompliance and these include the issue of capacity to monitor and enforce agreements as earlier discussed, the political environment of a country, public opinion, preferences of those in power and the economic environment.[107] The combination of severe poverty with the potential to make vast profits by trading products made from endangered species has instead prompted many government officials to look the other way rather than enforcing the provisions of CITES.

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104 Randi E. Alarcóón, "The Convention on International Trade in Endangered Species: The Difficulty in Enforcing CITES and the United States Solution to Hindering the Illegal Trade of Endangered Species" (2001) 14 N.Y. Int'l L.Rev. 105 at 117.

105 OECD, *supra* note 41 at 9.

106 Charnovitz, *supra* note 95.

107 David Vogel & Timothy Kessler, "How Compliance Happens and Doesn't Happen Domestically" in Edith Brown Weiss & Harold K. Jacobson, eds., *Engaging Countries: Strengthening Compliance With International Environmental Accords* (Massachusetts: MIT Press, 1998) 19-37.

A second argument is that the machinery for international trade in endangered species is based on many assumptions and most of these assumptions are made by the North. The assumptions put the developing countries at the risk of unknowingly flouting some of the international trade regulations. For example, the dependence on wildlife as a source of foreign exchange earning is seen usually in the negative light of greed.[108]

However, developed countries have not exactly set a very good example when it comes to ratifying agreements that will drastically and adversely affect their economies. A good example is the Kyoto Protocol to the UNFCCC.[109] The United States, Australia, Japan and other developed countries have refused to ratify the Protocol in essence because of the perceived negative effects on their economies. The recent wave of debate on the Kyoto Protocol across North America, especially in the Province of Alberta, lends credibility to this observation.[110] The difference under CITES is that the developing countries ratified the Agreement, but have substantially weakened the effectiveness of the treaty as the framework for sustainable development remains unaddressed in their countries. The existence of, for instance, the Convention on Biological Diversity (CBD)[111] suggests that the North-South issues were not expressly addressed in CITES. The CBD was negotiated after CITES had been in force for decades and it seeks to address some of these problems identified.

Internationally, a fundamental tension exists between the concepts of "sustainable

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108 See Karin Mickelson, "South, North, International Environmental Law, and International Environmental Lawyers" (2000) 11 Yearbook of International Environmental Law 52.

109 10 December 1997, 35 I.L.M. 1165;online:<http://unfccc.int/resource/docs/convkp/kpeng. html> (date accessed: 11 March 2004), discussed *supra* in chapter three.

110 Online: Government of Alberta <http://www3.gov.ab.ca/env/climate/actionplan/index.html> (date accessed: 11 March 2004).

111 *The Convention on Biological Diversity,* 31 I.L.M. 818 (1992) [hereinafter CBD].

development," on the one hand and the sovereignty of individual countries to set their own environmental policies and standards, on the other.

Thirdly, on the issue of NGOs, CITES has to be structured in a way that will revolutionize the status of non-state actors, not necessarily to make them subjects of international law. On the other hand, non-state actors should be made responsible, in their own right, for their actions, thereby removing the loophole that presently exists in that regard. As previously pointed out, the advantages posed by NGO groups including sharing a similar focus without political overtones, the ability to transcend geo-political boundaries, and their track record in treaty negotiations make them a more plausible instrument in this regard.

Until the time when all countries share similar environmental values of species, and possess the similar means to act on those values, the trade and environment fields will be contentious.[112] Since it is not tenable to wait for the consensus of values, CITES as it stands, needs to be expanded to show that it recognises more than one set of values. CITES appears to promote the animal conservationist view above the worries that beset the states in the South. Besides, the trade measures that are currently being adopted may be more efficient if this happens. It has been shown that with some species, rather than bans or control measures decreasing their tendency toward extinction, the controls increase such a tendency.[113] This is a signal, then, that bans are not the ultimate solution to the problem of wildlife endangerment. For CITES to be effective, the basic issues of survival must be addressed in developing countries.

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112 Raul & Hagen, *supra* note 81.

113 See the discussion on the African elephant, *supra*.

CHAPTER 5

IMPLEMENTATION AND COMPLIANCE ISSUES IN INTERNATIONAL ENVIRONMENTAL TREATIES: RECOMMENDATIONS AND CONCLUSIONS

This chapter will examine the concepts of implementation of and compliance with international environmental agreements. The intention is to examine the treaties in the preceding chapters, this time with a focus on how effectively they address the environmental problems under the aegis of cooperation, in light of the issues of sovereignty raised in previous chapters.

This chapter will also consider the effectiveness of environmental treaties (specifically, the climate change regime[1] and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[2]) with specific attention to the identified concepts of state sovereignty and global partnership as seeming contradictions. The main question this chapter seeks to explore is: have the climate change regime and CITES really addressed the problems of climate change and wildlife depletion?

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1 The regime consists of the *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849; online: UNFCCC <http://unfccc.int/resource/conv/conv.html>[hereinafter UNFCCC] (date accessed : October 2003); *Kyoto Protocol to The United Nations Framework Convention on Climate Change*, 10 December 1997, 35 [hereinafter the Kyoto Protocol or the Protocol](date accessed: 11 March 2004).

2 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 12 I.L.M. 1085 (1973), online: UNEP <http://www.cites.org/eng/disc/text.shtml#texttop> [hereinafter CITES] (date accessed: 11 March 2004).

5.1 Definition of Key Terms Relating to Implementation and Compliance in International Environmental Law

International environmental law has shifted its focus in recent years from lawmaking to the effectiveness of multilateral environmental agreements. This shift can be attributed to the influx of treaties in the 1980s, and the glaring absence of a central enforcement body. The problem with international environmental law thus shifted from lack of coordinated regulation to lack of enforcement. This is because, "[f]rom the environmental point of view, noncompliance yields the same result as nonratification."[3] Furthermore, the mere fact of the existence of an international agreement is not necessarily a pointer to the possibility of effectiveness. Rather, it is just a blatant statement that, for whatever reasons, parties have decided to reach a consensus on the subject covered by the agreement.[4] International scholars and observers of international affairs appear to be united in the belief that "what is needed now is less the adoption of new instruments than more effective implementation of existing ones."[5] By the end of 1998, over one thousand legal instruments on the environment had been negotiated.[6] However, not that many of them were succesfully addressing the problems they set out to.

To understand the foregoing issues of sovereignty and partnership and how they affect implementation, compliance and effectiveness, it is necessary to define three

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3 Mark A. Drumbl, "Poverty, Wealth, and Obligation in International Environmental Law" (2002) 76 Tul. L. Rev. 843 at 852.

4 Michael J. Kelly, "Overcoming Obstacles to the Effective Implementation of International Environmental Agreements" (1997) 9 Geo. Int'l Envtl. L. Rev. 447 at 448.

5 Martti Koskenniemi, "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol" (1992) 3 Y.B. Int'l Envtl. L. 123 at 124.

6 Edith Brown Weiss *et al*, International Environmental Law: Basic Instruments and References 8-144,160-66 (1992) in Edith Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths (1999) 32 (5) Univ. Rich. L. Rev. 1555 at 1555.

frequently used terms in this chapter: compliance, implementation and effectiveness. These concepts have been subjects of studies by academic researchers.[7]

5.1.1 Compliance

Compliance is often confused with terms such as *implementation*, *effectiveness* and *enforcement*.[8] Although these terms are similar, the similarity ends in the fact that they all refer to "different aspects of the process of achieving international political and legal cooperation."[9] Compliance generally refers to conformity with a specified rule. In international law, it refers to "an actor's behavior that conforms to a treaty's explicit rules."[10]

This chapter will examine how states conform to the rules of the agreement they purport to support in principle. It should be noted here that "substantive" compliance has been distinguished from "procedural" compliance and even from compliance that reflects the spirit of the agreement.[11] A state may be compliant in one sense, but not in other sense(s). If a state complies with obligations set out in an agreement, but fails to set up, for instance, the required domestic bodies required for physical implementation of the agreement, it is in

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7 Edith Brown Weiss & Harold K. Jacobson, eds., "Implementation, Compliance and Effectiveness", in American Society of International Law Proceedings. (Dordrecht: Kluwer Law International, 1997) at 91; Edith Brown Weiss & Harold K. Jacobson, eds., *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, Mass.: MIT Press, 1998); Markus Ehrmann, "Procedures of Compliance Control in International Environmental Treaties" (2002) 13 (2) Colo. J. Int'l Envtl. L. & Pol'y 377; Rosalind Reeves, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (London: Earthscan Publications Ltd: 2002) especially at 16-22.

8 Michael Faure & Jurgen Lefevere, "Compliance With International Environmental Agreements" in Norman J. Vig & Regina S. Axelrod, eds., *The Global Environment Institutions, Law, and Policy* (Washington, D.C.: Congressional Quarterly Press, 1999) 138 at 138-139.

9 *Ibid.* at 139.

10 Ronald B. Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* (Cambridge, Mass.: MIT Press, 1994) at 30.

11 Harold K. Jacobson & Edith Brown Weiss, "Compliance with International Environmental Accords: Achievements and Strategies", in Mats Rolén, Helen Sjöberg & Uno Svedin, eds., *International Governance in Environmental Issues* (Dordrecht: Kluwer Academic Publishers, 1997) 78 at 82-84.

substantive, but not procedural compliance. It is often more difficult to prove compliance in international environmental agreements because for one thing it is difficult to prove that environmental harm was directly caused by a particular activity.[12] This is further compounded by the time lag between activities and physical manifestation of a resulting harm. For instance, desertification has been traced to deforestation,[13] but not the activities of a particular group of people within a specified time-frame. Furthermore, it is impossible to measure the level of compliance. A nation cannot be said to be a quarter or half-compliant. Also, as pointed out earlier, although international environmental agreements are viewed as an important means of changing state behavior, there are other actors whose actions directly affect the environment, but who are not subjects of international law.

5.1.2 Implementation

Implementation refers to specific actions taken by states toward integrating an international agreement into its national legal system with the intention of achieving *compliance* with the agreement. The term is specifically used to refer to the process of legislative, administrative and other measures taken by the state parties to an international agreement in fulfilling their commitments.[14] Therefore, implementation can be said to be the means to compliance.

5.1.3 Effectiveness

Effectiveness is the attainment of a treaty's goals. The term differs from

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12 Ehrmann, *supra* note 7 at 380.

13 Alastair Iles, "Desertification Talks Open Amid Cautious Optimism" (1994) 17 Int'l Envtl. Rep. (BNA) No. 12, at 510-11 in "Recent Development: the Desertification Convention: A Deeper Focus on Social Aspects of Environmental Degradation?" (1995) 36 Harv. Int'l L.J. 207 at 208. See also William C. Burns "The International Convention to Combat Desertification: Drawing a Line in the Sand?"(1995) 16 Mich. J. Int'l L. 831 at 836.

14 *Ibid.* at 377.

compliance and implementation in the sense that while the latter terms are concerned with isolated and specific actions of states under an agreement, the former addresses the effect of the agreement. Effectiveness addresses the question of whether a treaty regime as a whole successfully addresses the problem it was intended to solve, and whether it can change behavior. It is less specific in nature. Many analysts define and assess effectiveness in unassuming terms as appropriate and visible behavioral modification.[15]

There are several criteria for measuring effectiveness and therefore several meanings of the term. The application of the term "effectiveness" in this thesis will be restricted to two areas: the achievement of goals set out in the instruments and the enhancement of national compliance with rules in the Kyoto Protocol and CITES (especially the latter, since it has entered into force).

5.2 Compliance and Implementation: Myth or Reality?

Generally, treaties follow a two-step approach –1) commitment by the parties and 2) execution of the commitments in the form of domestic regulation of the source of the environmental problem sought to be addressed. The second step is often called treaty implementation.

The major strength of international law unfortunately also happens to be its major weakness, i.e., the lack of a central enforcement authority. Treaties rely on the traditional methods of enforcement which include the concepts of "state responsibility and liability, traditional dispute settlement, and countermeasures such as reprisals, retorsions

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15 Robert O. Keohane et al., "The Effectiveness of International Environmental Institutions" in Peter Haas, Robert O. Keohane & Marc A. Levy, eds., *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge, Mass.: MIT Press, 1993) 3 at 7. See also David G. Victor, Kal Raustiala & Eugene B. Skolnikoff, eds., *Introduction and Overview to The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge, Mass.: MIT Press, 1993).

..."[16] In other words, treaties rely on moral/ethical considerations for enforcement, and in some cases, outright bribery and/or blackmail.[17] When there are disputes though, the major forms of dispute resolution are arbitration, adjudication, mediation, conciliation and negotiation. However, these are not the subjects of this thesis as they happen post-noncompliance.

It has been said that ""[c]ompliance" is a poor indicator of the effectiveness of international environmental cooperation. Often compliance has been high even when commitments have had little or no influence on behavior."[18] A study of international relations and the study of international reputations[19] would, however, make this an arguable point. States sign on to international agreements sometimes for primary reasons unrelated to the objective of the agreement. As earlier pointed out, states sign onto agreements in their own interests, and their stance on the values of the agreement appear to be a secondary reason. In the instance of developing states in the South, signing onto some international agreements provide them with funding, purportedly for development projects.[20] So, even when developing states do not believe that other states have the right to determine what happens within their territorial boundaries, some would sign on to agreements that do just that. The overall effect of this phenomenon on compliance is that states sign on to agreements they may not believe in as a means of getting aid even when they do not intend

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16 Ehrmann, *supra* note 7 at 379. Although treaties rely on in-built mechanisms, such as reporting or dispute settlement, this writer agrees with Ehrmann that the moral/ethical considerations hold more sway.

17 Some countries have been known in the past to trade votes, by supporting one another's proposals at international fora.

18 David G. Victor, "International Environmental Agreements: Compliance and Enforcement: Enforcing International Law: Implications for an Effective Global Warming Regime" (1999)10 Duke Env L & Pol'y F. 147 at 183; George W. Downs, David M. Rocke & Peter N. Barsoom, "Is the Good News about Compliance Good News About Cooperation? (1996) 50 (3) International Organization 379.

19 See for instance, see George W. Downs & Michael A. Jones, "Reputation, Compliance, and International Law" (2002) 31 J. Legal Stud. S95.

20 A number of international agreements provide for funding for developing states.

to comply with the agreement. However, even when developing states in the South are willing to comply with the agreements they have signed on to, these developing countries may lack the means to do so. This is further compounded by unstable governments, corruption and poverty. Whatever meagre means developing countries have, they are depleted by corrupt government officials who place the lowest priority on things like education and environmental well-being.

The point being made here is that signing, acceding or ratifying treaties is not the bane of international environmental agreements. There are more socio-economic factors that must be addressed before the environment can attain the position of importance that the North seeks to ascribe to it. In the two regimes under discussion, the weaknesses identified in the previous chapters focus mainly on the issue of implementation. Implementation may in turn be linked to capacity and sovereignty issues. It will be shown in this chapter that the reliance on moral/ethical considerations as an inducement to get states to comply has not resulted in effective agreements. This is especially true as it increasingly becomes obvious that the platitudes about compromises and global cooperation at treaty negotiations do not work.

I do not intend to argue that the vagaries of implementation, compliance and effectiveness can be explained by sovereignty. Sovereignty, though an important factor, cannot entirely explain the previously discussed difference in attitude of developed and developing countries to environmental issues. If it could, dispute resolution, as it is currently carried out, would suffice in solving international environmental problems involving treaty noncompliance. It does not suffice however because treaty noncompliance is not always intentional. Research shows that deliberate noncompliance is not as common as one likes to imagine it is.[21] States generally undertake treaty

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21 Abram Chayes & Antonia H. Chayes, "On Compliance" (1993) 47 Intl. Org. 175. Chayes and Chayes argue this point in detail. See also a follow-up to this argument in their book, *The New Sovereignty: Compliance With International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995). See also Abram Chayes & Antonia H. Chayes, "Compliance Without Enforcement: State Behavior Under Regulatory Treaties" (1991) 7 Negotiation Journal 311-330. This approach has been variously debated in academic circles. See Harald H. Koh,"Why do Nations Obey International Law?" (1997) 106 Yale L. J. 2599 at 2645-2659 and Ronald B. Mitchell, "Compliance Theory: An Overview" in James Cameron, Jacob Werksman & Peter Roderick, eds., *Improving Compliance with international Environmental Law* (London: Kogan

obligations intending to fulfill them,[22] having expressed (and hopefully incorporated) their interests in the negotiations of the treaties. Admittedly, treaties are frequently the result of a compromise, but they will hardly ever be completely contrary to the interests of a participating state.

If states generally sign on to agreements with the intention of fulfilling their obligations under such agreements, other reasons must explain the degree of noncompliance associated with international law. In most cases, noncompliance is not a result of pre-conceived costs and benefits analysis, but rather, the result of other variables.[23] States' inability to implement the treaty provisions in a manner that contributes to the effectiveness of agreements constitutes one of the major reasons for noncompliance.[24] Therefore, international agreements must also concentrate on affecting not only the behavior of states, but also, the behavior of individuals, firms, and other stakeholders since state behavior is insufficient for treaty compliance.

One main reason for noncompliance is the responsibility placed on states to undertake domestic measures implementing agreements and measures to monitor domestic compliance. Even if the willingness to comply exists, the ability to do so may be lacking. Environmental agreements in particular often require copious expertise and monitoring. State agencies and bureaucracies in the South usually do not have the resources, authority or personnel to implement agreements fully.[25]

Compliance efforts must then directly address the major roots of noncompliance. If a state's lack of capacity results in noncompliance, it will be inappropriate

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Page, 1996) 3-28. See further to this, *An Agenda for Development: Report of the Secretary-General,* U.N.GAOR, 48th Sess., Agenda Item 91, para. 83, U.N. Doc. A/48/935 (1994); "Overall Progress Achieved Since the United Nations Conference on Environment and Development, Report of the Secretary-General, Addendum on Legal Instruments Mechanisms" 5th Sess., para. 16-18, U.N. Doc. E/CN.17/1997/2 Add.29 (1997).

22 Chayes & Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements, ibid.* at 27.

23 Chayes & Chayes, "On Compliance" *supra* note 21 at 183-197.

24 Ehrmann, *supra* note 7 at 387.

25 UNEP, *The State of the World Environment* (Geneva: UNEP,1987) 66-67.

to use sanctions that are coercive. Instead, various forms of assistance and capacity building would seem to be the more suitable solution to noncompliance in that situation.[26] For instance the prospect of a problem of emissions by developing states rivalling that of developed countries can be addressed beforehand by capacity building, i.e., assistance with newer technology and personnel training. Rather than make an issue out of the differing standards under the Kyoto Protocol, developed countries should be proffering practical solutions that will level the playing field and render the developing countries more likely to be able to carry out any emission reduction undertaking they subsequently make. If the CDM is properly structured, it may be helpful toward achieving this.

Under CITES, capacity building, apart from personnel training, can take the form of delayed timing for developing countries in the implementation of their treaty obligations and credits for developed countries for capacity building in developing countries. One of the reasons illegal trade in endangered species is successful is the absolute ban of species in Appendix I. However, as earlier discussed, the result in some cases has been an escalation in the depletion of the species rather than the opposite.

Unfortunately, it does not appear that the Kyoto Protocol and CITES have adequately addressed assistance and capacity building. The point being canvassed here is that the identified evolved concept of sovereignty identified in previous chapters may not radically conflict with the global cooperation proposed in many international agreements. Rather, the bane of international agreements is the different capacity of states from the North and the South to fulfill international obligations. An examination of CITES and the Kyoto Protocol will focus on the issues raised above.

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26 Ehrmann, *supra* note 7 at 388.

5.2.1 CITES

The questions to be asked in the case of CITES and the issues of implementation, compliance and effectiveness include: are the permits that are required under CITES actually obtained by importers and exporters of species? If permits are obtained, are they obtained free from fraud? Do they provide required information? Do parties file proper reports of trade in species allowed under CITES,[27] i.e., are parties in compliance? Do parties that have ratified CITES have the required expertise and human resources to carry out inspections of imports and exports? What specific actions have been taken by states to uphold the agreement? In other words, do parties implement the agreement? Perhaps the ultimate question is whether CITES is achieving the main purpose it seeks to address – control of extinction of species through international trade in endangered species, i.e., is it effective? How helpful is the control of international trade in species in the larger effort to control extinction?

One shortcoming of CITES is the vagueness of its language, and this directly reflects on compliance with, and enforcement of, the agreement. In most cases, it is the result of an attempt to make the Convention all-inclusive. The definition in Article 1 of the term "species" is one example. Article I (a) provides: "'species' means any species, subspecies, or geographically separate population thereof... ." There are populations that are vast in certain countries and sparse in others. Although Appendix II may provide some sort of remedy to this category by allowing the listing of "look-alike species,"[28] Appendix I which offers a higher level of protection does not permit for similar kind of listing.

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27 Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" *supra* note 6 at 1565.

28 Article II (2)(b) provides:

> [o]ther species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.

Another example can be found in the definition of "specimen" in Article 1, which is vague. Article 1(b) provides that:

> "Specimen" means:
>
> (i) any animal or plant, whether alive or dead;
>
> (ii) in the case of an animal: for species included in Appendices I and II, any *readily recognizable part or derivative* thereof; and for species included in Appendix III, any *readily recognizable part* or *derivative* thereof specified in Appendix III in relation to the species; and
>
> (iii) in the case of a plant: for species included in Appendix I, any *readily recognizable part or derivative* thereof; and for species included in Appendices II and III, *any readily recognizable part or derivative* thereof specified in Appendices II and III in relation to the species . . . [Emphasis added].

The phrase "readily recognizable part or derivative" is not defined. It therefore leaves an opening for subjective interpretations. As a result, trade in certain readily recognizable parts and derivatives is regulated by some parties to CITES but not by others.[29] This point is more obvious in the grouping of elephant tusks as raw and "worked." This would be reflected in the information provided for the purpose of obtaining the said permits. Where a specie's parts or derivative are not readily recognizable, they are not covered by the provisions of CITES.

Another shortcoming is that when parties are displeased with the framework of CITES, the text of the Convention can be changed. An amendment to the text of the Convention is adopted if there are two-thirds affirmative majority votes of the present and voting parties. Strangely, only those parties who voted in favor of the amended provision are bound by the changes unless any other party later submits an instrument of acceptance showing a desire to be similarly bound.[30] CITES calls for parties to rely on one another to

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29 Karl Jonathon Liwo, "The Continuing Significance of the Convention on International Trade in Endangered Species of Wild Fauna and Flora During the 1990's", (1991) 15 Suffolk Transnat'l L. Rev. 122 at 147.

30 *Ibid.* at 135.

protect indigenous wildlife beyond the territorial limits of national sovereignty.[31] This mandate is premised on the belief that an instrument that exists to protect endangered species from over-exploitation as a result of commercial trade cannot exist without wide international approval. While this nod to state sovereignty may have contributed to any success attributed to CITES,[32] its multifarious membership has led to problems that undercut the treaty's goal. Since the authoritative body behind the treaty is unable to enforce the treaty, it is left to rely on persuasive means to convince parties to comply or induce the parties to call for international sanctions against noncomplying countries.[33] This brings us back to reliance on ethical and moral considerations previously discussed.

Another weakness of CITES may be seen in the provision under Article XXIII which provides:

> **Reservations**
> 1. The provisions of the present Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Articles XV and XVI.
> 2. Any state may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to:
> (a) any species included in Appendix I, II or III; or
> (b) any parts or derivatives specified in relation to a species included in Appendix III.
> 3. *Until a party withdraws its reservation entered under the provisions of this Article, it shall be treated as a state not a party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation.* [Emphasis added].

This provision allows parties to reserve the right to conduct trade in, for instance, any species included in Appendix I, i.e., species under an absolute trade ban. For

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31 *Ibid.* at 127-128.

32 Success, maybe in attracting a large number of states to ratify it. See Simon Lyster, *International Wildlife Law* (Cambridge: Grotius Publications Ltd., 1985) 240-241.

33 Liwo, *supra* note 29 at 132.

the purposes of trade in species contained in any such reservation, a party that enters a reservation is considered a nonparty. The loophole here is that CITES allows parties to trade with nonparty states and imposes only vague restrictions on this interaction.[34]

The measures that are relied on by CITES, especially the absolute ban, have been criticized by several proponents of free trade. Environmental trade measures (ETMs) have been criticized over the years for not being effective at dealing with the environmental problems they propose to address.[35] The attempt to ban the trade in African elephants is an example. The ban lowered the value of ivory on the world market and many Africans necessarily relied more on income from farming. Thus, they were less tolerant of the elephant population, which by the way was growing and so needed more food than their usual forays afforded them. The elephants ventured into farms and trampled the fields and, in response, many more elephants were killed.[36] Although fewer elephants were killed for international trade and the CITES ban may have lowered the trade in ivory, it led to the killing of more, rather than fewer, elephants.[37] Furthermore, going back to the discussion in chapter four on the inter-relation of the ecosystem, the increased elephant population causes

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34 CITES, *supra* note 2 Article X provides:

> Where export or re-export is to, or import from, a state not a party to the present Convention, comparable documentation issued by the competent authorities in that state which substantially conforms to the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party.

35 Kym Anderson, "Environmental and Labor Standards: What Role for the WTO?", in Anne O. Krueger, & Chonira Aturupane, eds., *The WTO as an International Organization* (Chicago: University of Chicago Press, 1998) 231 at 244. See also Lynne Duke, "Limited Trade in Ivory Approved: African Proposal Overrides U.S. Opposition at CITES Conference" Washington Post (20 June 1997) at A16.

36 Anderson, *ibid.*

37 *Ibid.*

other species to become increasingly endangered.[38]

Under CITES, species can be consumed domestically without violating the agreement. This raises the question of the efficacy of CITES as an effective instrument for biological conservation.[39] Although a lot of developing states have legislation regulating domestic consumption, lack of capacity to enforce these regulations render them toothless. Capacity building in these areas will be of great assistance.

5.2.2 The Kyoto Protocol

According to Jutta Brunee:

> The development of a noncompliance regime is a challenge in any multilateral environmental agreement (MEA) negotiation. Concerns about ensuring the achievement of a MEA's environmental goals, and about ensuring a level playing field among parties, compete against states' reluctance to subject themselves to sovereignty-invasive procedures, let alone penalties for noncompliance. The design of MEA noncompliance procedures or mechanisms involves striking a delicate balance between steps to bring about parties' full compliance with their commitments and respect for individual states' sovereign spheres. The balancing act is nowhere more complex than in the context of the Kyoto Protocol... .[40]

The statement sums up the challenges of the Kyoto Protocol. GHG emissions, and carbon dioxide emissions in particular, are strongly related to industrial growth and by necessity, growth in the standards of living. Indeed, in the context of the global warming

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38 *Ibid.*

39 See Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths, *supra* note 6 at 1565.

40 Jutta Brunnee, "A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol" (2000)13 Tul. Envtl. L.J. 223 at 225-226.

debate, GHG emissions are directly connected with rising living standards: the higher a country's living standards, the higher its emissions tend to be, and vice versa. The stakes in the Kyoto Protocol are high as they directly affect the economies of states. This to the writer, is more evident in the reticence of the U.S. and other developed countries in ratifying the Protocol based on a mechanism that has been used in other treaties without objections. The challenge to Kyoto is to find a balance of credible and acceptable compliance procedures and mechanisms which also take into consideration the differing capacities of countries from the North and the South. That way, the South will be participating and this will remove the U.S.' major source of disagreement.

. The questions under the Kyoto Protocol will differ from the ones asked under CITES, mainly because the Kyoto Protocol has not yet entered into force. Such questions include: is the Protocol feasible, i.e., can the climate change regime address the issues of GHG emissions and climate change? How does the refusal of the U.S. to ratify the Kyoto Protocol fit into the concept of sustainability in previous agreements and the concept of global cooperation toward overcoming the problem of climate change?[41]

It may be helpful to examine the Kyoto Protocol experience of a developed nation. Canada's commitment under the Kyoto Protocol is a 6 percent reduction in GHG emissions below 1990 levels during the commitment period of 2008 to 2012. However,

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41 For instance the *Stockholm Declaration on the Human Environment*, 16 June 1972, UN Doc. A/Conf.48/14/Rev.1(UN Pub. e.73, II.A.14); 11 I.L.M. 1416 [hereinafter the Stockholm Declaration] and *Rio Declaration on Environment and Development*, 14 June 1992, A/CONF.151/26(Vol. I), 8; 31 I.L.M. 874 [hereinafter the Rio Declaration].

national emissions steadily increased from 607 Mt in 1990, to 699 Mt in 1999.[42] The predominant source of Canada's GHG emissions is the extraction, distribution and consumption of coal, oil and natural gas – fossil fuels were estimated to account for 78 percent of national emissions in 1996.[43] Furthermore, national Canada emissions were projected to increase to 809 Mt by 2010 if no climate policy initiatives are taken.[44] Therefore, reductions of approximately 240 Mt, a 29 percent reduction from business-as-usual practices, were considered necessary. On December 17, 2002, the Government of Canada announced its ratification of the Kyoto Protocol to the UNFCCC.[45]

Then, on April 19, 2003, the government of Canada released the 2001 GHG inventory data.[46] According to the government data, greenhouse gas emissions in Canada had been reduced by 1.3 per cent in 2001– the first yearly decline in emissions since 1991-92, and the first time since 1990 that emissions have dropped during a period of economic growth.[47] Was the change due to factors outside the Protocol? Does the data prove wrong the assertion that the Protocol will end up as a "paper tiger: an agreement that looks strong on

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42 Mt is a simplification of the unit million tonnes (of carbon dioxide equivalent). See Philip Barton, "Economic Instruments and the Kyoto Protocol: Can Parliament Implement Emissions Trading Without Provincial Co-operation ?" (2002) 40 (2) Alta. L. Rev. 417 at 426.

43 F. Neitzert, K. Olsen & P. Collas, *Canada's Greenhouse Gas Inventory: 1997 Emissions and Removals With Trends* (Ottawa: Environment Canada, 1999) at 9.

44 Government of Canada, A Discussion Paper on Canada's Contribution to Addressing Climate Change (Ottawa: Supply and Services Canada, 2002) at 15. See also online: Government of Canada <http://www.climatechange.gc. ca/english/ actions/what_are/canadascontribution/ Report051402 /englishbook.pdf> (date accessed: 11 October 2003).

45 For further information, see online: Government of Canada <http://www.climatechange.gc.ca/ english/actions/what_are/index.shtml> (date accessed: 26 May 2003).

46 See online: Environment Canada <http://www.ec.gc.ca/pdb/ghg/canada_2001_e.cfm >(date accessed: 11 March 2004).

47 See online: Environment Canada <http://www.ec.gc.ca/pdb/ghg/whatsnew1_e.cfm> (date accessed: 11 March 2004).

the surface but has no viable mechanism for enforcement and does little to control emissions... because the fundamental principle on which it is based – setting "targets and timetables" for reductions in greenhouse gas emissions – is economically flawed and politically unrealistic"?[48] If so, how tenable is the argument that the reductions of emissions in some developed countries – United Kingdom, Germany and Russia – have nothing to do with climate change policy? [49] Is the data in Canada any different? After all, Canada did not ratify the Protocol until late in 2002.[50] The argument is that developed countries and industries within them are taking steps independent of the Kyoto Protocol to reduce GHG emissions.

Important equity issues are raised by the mechanisms under the Kyoto Protocol and these concerns directly affect the issues of compliance, implementation and effectiveness of the Kyoto Protocol. In the negotiations of the Kyoto Protocol, for instance, the U.S. was adamant that it would not ratify the agreement as it stands – with no binding emission reduction goals for developing countries. In other words, is the implementation of the Kyoto Protocol dependent on the assertion of U.S. sovereignty over the much-touted global cooperation?

The success or failure of the Kyoto Protocol mechanisms will very much

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48 Warwick J. Mckibbin & Peter J. Wilcoxen, *Climate Change Policy After Kyoto: Blueprint for a Realistic Approach* (Washington, D.C.: Brookings Institution Press, 2002) at 51.

49 *Ibid.* at 58. The argument is that even without Kyoto Protocol, the mentioned countries have been able to effect emission reduction, suggesting in a sense, that the Protocol is redundant and that countries need not undertake specific goals of reductions..

50 See online: Government of Canada, <http://www.climatechange.gc.ca/english/newsroom/2002/20021217_kyoto.asp> (date accessed: 11 March 2004).

depend on the policies that the parties are developing to flesh out the mechanisms.[51] The main mechanism of concern in this thesis is the CDM. The Mechanism creates a channel for nations from the North to gain partial credit for national emission reductions achieved through bilateral projects in nations in the South. It is projected that the North will benefit by gaining credits[52] and the South will benefit from the development to brought about by the said projects.

The vagueness of the CDM creates the likelihood of conceptual confusion. Questions remain unanswered as to the actual modalities of the CDM. How different will the Mechanism be from similar mechanisms? Many developing states are bogged down with problems relating to poor management of funds, lack of requisite trained personnel and poor basic implementation abilities. Since these problems will be equally applicable to the implementation of the Kyoto Protocol CDM, the COP must address these problems.

Apart from the problem of lack of corresponding emissions-reduction commitment for the South, a major part of the North believes that the Kyoto Protocol does not pass the cost-benefit test – on the national and international levels. According to this view, the costs involved in monitoring compliance dealing with noncompliance outweigh the benefits. Benefits that they claim accrue largely to foreigners.[53] It is further argued that the effect of this on the international level not only undermines the Agreement but also devalues emissions for the purposes of trade,[54] and since the Protocol does not select any one

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51 Brunnee, *supra* note 40.

52 Drumbl, *supra* note 3 at 878.

53 Mckibbin & Wilcoxen, *supra* note 48 at 55.

54 *Ibid.*

of the mechanisms as superior over the others, emissions trade may decrease the value of the CDM, which currently appears will be a more expensive option. However, from the point of view of global partnership, out of the three mechanisms proposed by the Protocol, the CDM appears to be the more feasible instrument for satisfying the much-touted principle of global partnership.

5.3 Conclusions and Recommendations

It is believed that "state compliance with international agreements is generally quite good and that enforcement has played little or no role in achieving and maintaining that record."[55] The argument in this chapter has been that the debatably "good" record is not a result of a desire by states to cooperate at the global level to address the ills that plague the environment. The touted "good" results are from the inherent determination of developed states to achieve goals set by them, using the global forum when it is needed to achieve goodwill and jettisoning it when too expensive a price to pay. The reality is that the proliferation of treaties is not a result of compliance with international agreements. Political goodwill is generated as a result of the number of agreements signed on to by states, and not the number of agreements signed and complied with.[56] The interconnectedness of states' economies is the main reason behind the willingness of most states (especially those in the South) to sign on to agreements they do not have the capacity or, in some cases, the willingness to implement. The attitude of the states from the North is typified by the stance

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55 Downs, Rocke & Barsoom, *supra* note 18 at 380.

56 Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" *supra* note 6 at 1556.

of the U.S. on the Kyoto Protocol. States should be held accountable to the international community under more stringent conditions than currently exist if the compliance record is to improve. To this end, developing countries from the South should be made to undertake phased-out emission reductions under the Kyoto Protocol similar to the system under the Montreal Protocol.[57] Although historic facts attest to the sources of climate change as being from both the North and the South,[58] Canada is the only state amongst the major GHG emitters to ratify the Protocol,[59] but even the federal government of Canada may have a fight on its hands with the provinces in the process of treaty implementation, because of provincial concerns that are similar to those of the U.S.[60] The Premier of Alberta, Ralph Klein, in a letter to the then Prime Minister of Canada, Jean Chretien, identified the concerns of Alberta about Kyoto as fourfold:

> • With Canada producing only two percent of the world's greenhouse gases, the commitment called for in the Protocol to reduce emissions by about six percent below 1990 levels by 2012 (equivalent to a 30-percent reduction in Canada) will have little discernible impact on global warming, but will result in the unnecessary loss of thousands of Canadian jobs, and an overall slowdown in Canadian economic growth. Because countries such

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57 *The Montreal Protocol on Substances that Deplete the Ozone Layer*, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 3 [hereinafter Montreal Protocol]. Article 5 of the Montreal Protocol takes into account the special situation of developing countries by granting a grace period: developing countries are entitled to delay compliance with the control measures set out in the Protocol for ten years. Paragraph 5 of Article 5 furthermore stipulates that the implementation by developing countries will depend upon the financial cooperation and transfer of technology by developed countries. See also, Ehrmann *supra* note 7 at 390.

58 Karin Mickelson, "South, North, International Environmental Law, and International Lawyers" (2000) 11 Yearbook of International Environmental Law 52 at 74.

59 See Government of Canada, *supra* note 45.

60 See online: Government of Alberta <http://www.gov.ab.ca/acn/200209/13052.html> (date accessed: 11 March 2004).

as the United States and Australia are not signatories to the Protocol, Canada will be put at an untenable disadvantage in the global marketplace. Canada is the only country in the western hemisphere with a reduction target, putting the nation at a further competitive disadvantage.

- The Kyoto Protocol will not result in substantive reductions in greenhouse gases around the world, but will see simply a shift in where the gases are produced and in billions of dollars from nations such as Canada to other countries.
- As the principal supplier of Canada's energy, Alberta will be especially hurt by federal ratification of Kyoto. There have been reassurances from your government that no region or sector will be unduly affected by implementation of the protocol, but there has as yet been no plan from your government on how this commitment can be met.
- Canadians in all parts of the country will be affected. While Alberta produces most of Canada's energy, it is all of Canada that consumes that energy. Therefore, Canadians will feel the effects of Kyoto - at the pump, on their utility bills, at the workplace, and on their ability to find jobs.[61]

According to the Alberta government, In order for Alberta and Canada to remain competitive, actions must be compatible with our largest trading partner, the U.S."[62] In other words, the Alberta government is cautioning against Canada ratifying and implementing the treaty before the U.S. does.

The apparent obstacles to the implementation of the Kyoto Protocol by states from the North that ratify the Kyoto Protocol, as exemplified in the case of Canada, are the

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61 *Ibid.*

62 See online: Government of Canada <http://jhss.wrdsb.on.ca/library/html/fedprov/enviro.htm> (date accessed: 11 March 2004).

result of an attempt to juxtapose sovereignty and global cooperation. The result is that politics overshadows both. Although states from the South sign on to international agreements, the earlier discussed ethical/moral issues as well as political considerations are obvious in the negotiations leading to the signing of the agreements. The expectations of the developing countries can be summed up thus:

> [W]hen radical inequalities exist, it is unfair for people in states with far more than enough to expect people in states with less than enough to turn their attention away from their own problems in order to cooperate with the much better-off in solving their problems (and all the more unfair... when the problems that concern the much better-off were created by the much better-off themselves in the very process of becoming as well off as they are).[63]

Thomas Franck observed that "nations like China, India, Algeria, and Brazil have argued that development, by which they usually mean industrialization, is more important to the well-being of their people than a fastidious concern for the environment."[64]

That said though, it must be realised that it is inevitable that a successful climate change regime must actively include developing countries in the effort to control GHG emissions. To formulate and implement effective environmental agreements, states must squarely confront several problems specific to the environmental area. First, because detrimental state activity often produces transboundary effects, states causing environmental damage are not the only ones to suffer such damage.[65] Thus, states may underestimate environmental problems and conclude that negotiating or assenting to agreements is too

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63 Henry Shue, "Global Environment and International Inequality" (1999) 75 Int'l Aff. 531 at 544.

64 Thomas M. Franck, Fairness in International Law and Institutions (Oxford : Oxford University Press, 1995) at 368.

65 Garett Hardin,"The Tragedy of the Commons" (1968) 162 Science 1243 at 1245.

costly. Second, states must avoid discounting the long-term environmental harms caused by their activities. Further to this, because environmental harms span generations, traditional cost-benefit analysis may fail. Third, developing countries have historically viewed the environmental movement with skepticism and have feared that it is merely another effort by the industrialized countries to solidify their economic advantages.[66] Fourth, environmental agreements pose unusual problems of implementation and enforcement for national governments. Finally, although traditional international law largely concerns itself with interstate actions, most environmental damage is caused not by states, but by individuals and corporations. In the light of this, capacity building for better enforcement and compliance becomes more important.

Some principles of international law were identified in chapter two and these principles also affect the implementation of and compliance with treaties. The Common but Differentiated Responsibilities (CBDR) principle certainly affects the effectiveness of the agreements under discussion. The Kyoto Protocol is affected more so than CITES, since the former in recognition of the capacity of developing countries versus developed countries

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[66] Kathryn S. Fuller, Ginette Hemley & Sarah Fitzgerald, "Wildlife Trade Law Implementation in Developing Countries: The Experience in Latin America" (1987) 5 B.U. INT'L L.J. 289 at 292. According to these authors (speaking specifically about the Latin American experience),"Some officials and traders view CITES as an imperialistic effort by foreigners to conserve species at the exporting countries' expense." They also referred to the African example, where Africans are resentful of CITES control on leopard and crocodile skin trades, with the argument that it counts as unfair restraint of trade. This is not helped by the perpetual struggle of the states from the South to "maintain a strong voice" in the CITES policy-making process. See page 293. According to some other authors though, this skepticism has decreased markedly in recent years. See for example, Paul R. Muldoon "The International Law of Ecodevelopment: Emerging Norms for Development Assistance Agencies", (1987) 22(1) Tex. Int'l L.J. 1 at 19-21. Muldoon stated on page 21 that :

> ...[C]ountries gradually perceived environmental protection goals not as an infringement on the right to develop, but as a necessary precondition for the long-term exercise of that right.

does not require developing countries to give undertakings on emission reductions. The lack of the requisite number of ratifying countries from the North is due largely to the CBDR focus of the Kyoto Protocol. Although CITES does not have the requisite machinery to enforce the CBDR principle, as it does not have measures that apply to capacity; the lack of enforcement of this principle appears to this writer to be the reason why CITES is not as effective in achieving its objectives as it ought to be. Efforts at cooperation have, therefore, become mere platitudes as the status of the principle remains vague, making the different attitudes of the North and the South to environmental issues more obvious.

The role that NGOs and international agencies can play in offering economic incentives suggests a new way of attacking traditional barriers to the success of environmental agreements, i.e., focussing on activity below the state level. Instead of attempting to constrain states' activity through coercive sanctions or direct regulation, international agencies and NGOs can work with state officials and individual citizens to inculcate in them an environmental ethic. These efforts may be relatively more cost-effective and less likely to raise significant sovereignty concerns. Currently, the role of NGOs is at best vague and unrecognised by international law. NGOs should be given specific roles in the international fora. For instance, if NGOs work with international agencies established to monitor treaties, they can work at the grassroots level to build domestic support for international environmental policies among environmental groups. They can also cooperate with other international organizations. However, because NGOs lack standing in tribunals responsible for adjudicating matters of international law, they have to rely on "the Politics of Shame: rousing public indignation, and embarrassing NSGs (National State Governments)

that find themselves held in scorn across the globe."[67] NGOs, if they have adequate access to international agencies, could increase the probability that the agencies will advance environmentalism as a goal. In return, international agencies can foster the development of communities of environmental scientists and experts, and can influence and train state officials.[68] Greenpeace, with more than four million members, has effectively promoted compliance by member states. Others are TRAFFIC and the World Wildlife Fund. NGOs have the funds and the impartiality to oversee environmental patterns of behavior and may be more instrumental in bringing about effectiveness of environmental agreements.[69] The international community should, however, establish monitoring NGOs and making them liable to the international community for their actions because NGOs should be made accountable to international fora in exchange for participation in global partnership. NGOs can bring to the partnership table their lack of allegiance to geographical entities and unbiased dedication to environmental goals.

My major aim in undertaking this research was to explore the two seemingly contrasting concepts of international environmental law – sovereignty and the more recently coined global partnership. The thrust of the thesis has been to examine the effectiveness of international environmental agreements against the background of the different perspectives of the North and the South to environmental protection.

Recognition of the interaction between law and politics has been a

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67 Stephen Toulmin, "The UN and Japan in an Age of Globalizati.on: The Role of Transnational NGOs in Global Affairs" online: Global Development Research Centre <http://www.gdrc.org/ngo/toulmin/st-main.html> (date accessed: 11 March 2004).

68 Tom Tietenberg, "Developments in the Law – International Environmental Law" (1991) 104 Harv. L. Rev. 1550 at 1552.

69 Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths", *supra* note 6 at 1580.

longstanding aspect of international legal research,[70] and a lot has been written on the emerging scholarly interplay between the fields of international law and international relations. Perhaps the most important – and contested – concept in these writings, is sovereignty. Sovereignty though a single concept, is also "two-sided." Internally, it describes the nature of authority within the modern state with the "Crown" as sovereign. Legitimacy attaches to that which emanates from the sovereign at the top, although this legitimacy is fictionally justified as emanating from some ultimate source. Externally, on the other hand, sovereignty is the defining characteristic of the modern state, the rights of a state to be autonomous, to "possess" sovereignty by means of the exclusive control over the territory and citizens within state borders, independent of "outside" influence. However, the evolution of the concept of sovereignty in international law has dictated the compromising situation, where sovereign states have matters that are under their national territories determined by other members of the international community. The only relic of the old understanding of sovereignty is that sovereign states are the exclusive actors possessing legitimate public authority, the sole "subjects" of international law.

Chapter three explored the concepts of sovereignty and global partnership under CITES. CITES employs the use of trade measures to attempt conservation of species. A complete ban allegedly infringes a state's sovereignty – the right to govern the affairs of its territory and people – because it paternally imposes a prioritization of environmental policies over all others. Thus, countries with needy populations must subordinate other interests like economic development to the environmental standards imposed by the

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70 See for instance, Anne-Marie Slaughter "International Law and International Relations Theory: A Dual Agenda" (1993) 87 A.J.I.L. 205; Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 Eur. J. Int'l L. 503; Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 A.J.I.L. 367.

Convention.[71] Because the CITES Secretariat has no enforcement powers, members' respective political and economic pressures have posed threats to effective compliance with the treaty. The reservation clause of CITES needs to be reexamined. As it currently stands, it operates against the Convention's purposes of trade control and wildlife preservation. CITES also needs to address the general lack of resources in developing states.[72] This writer does not however believe that the free-rider syndrome which has characterised international treaties should be further encouraged. A system where credit can be given in return for efforts of states to contribute to a decrease in the rate of extinction of wildlife may be more in keeping with the true spirit of cooperation that the writer advocates.

A reality check presents the truth of international power and international relations – wealth dictates power on the global level. States aspire to be powerful and seek to be or remain wealthy. International trade "remains the critical source of future wealth generation, with the state retaining – or giving up – whatever authority is needed to make trade work."[73] In the end it is all about economic and political power and which states control one and therefore the other, subsequently having or assuming the right to decide which environmental harms should be addressed and how, and maybe even when it should be addressed. This is the significant message of the failure of the international community to

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71 Nina Bombier, "The Basel Convention's Complete Ban on Hazardous Waste Exports: Negotiating the Compatibility of Trade and the Environment" (1997) 7 J.E.L.P. 325 at 343. Although the writer's arguments were written in the context of the Basel Convention, the arguments are analogous to those of CITES.

72 See John B. Heppes & Eric J. McFadden, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora: Improving the Prospects for Preserving Our Biological Heritage", (1987) 5 B.U. Int'l L.J. 229; See also Shennie Patel, "The Convention on International Trade in Endangered Species: Enforcement and the Last Unicorn"(1995) 18 Hous. J. Int'l l. 157.

73 Michael M'Gonigle "Between Globalism and Territoriality: The Emergence of an International Constitution and the Challenge of Ecological Legitimacy" (2002) 15 Can. J. L. and Juris. 159 at 169.

adopt and ratify the Kyoto Protocol to the UNFCCC.

The principle of common but differentiated responsibilities cannot be underplayed in either CITES or the Kyoto Protocol. However, the international community must decide which interpretation it will adopt in order to be a success. Is it the perspective that accepts and responds to the differing technological and financial capacities and roles of both the North and the South in addressing environmental harm, or the perspective that seeks to rely solely on historical facts to place the source of the harm in the North and thus place the responsibility for addressing the harm on the North? This explains the reason behind the *impasse* of the Kyoto Protocol.

Chapter four examined the Kyoto Protocol to the UNFCCC. Currently, the U.S. has refused to ratify the Protocol, preferring to adopt its own version of an emission reduction regime. The point is that global partnership gives meaning to the phrase "there is strength in numbers" and for reasons explored earlier in chapters one and two, it is preferred that there be a joint effort by the international community to address environmental protection. The U.S. does have a valid concern about the apparent encouragement by the Kyoto Protocol of the "free rider" syndrome. Although the historic context of the global-warming crisis must not be oversimplified, the Kyoto Protocol as it is currently drafted stands no chance of succeeding as long as developing countries do not undertake defined emissions reductions. The Kyoto Protocol must take into account the U.S. concerns while addressing the developmental needs of the South. The strategy has to be one that will encourage a compromise on the parts of both the North and the South, by encouraging projects that will encourage emission reduction parallel to per capita emissions and

development needs. To this end, the CDM is a useful tool if properly structured.

The different parties to international environmental agreements must be willing to compromise on current attitudes if the agreements are to be effective. The South should be more forward-looking as to solutions and not backward-looking as to faults. Sovereignty, though intrinsic to the nationhood of a state, has taken a newer definition and is constantly compromised by global cooperation. The North, on its part, must be willing to give up its paternalistic outlook and be willing to be partners in the true sense of the word, while taking into account the different capacities of parties. Both agreements examined will benefit from such a proposed change in attitudes.

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